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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
CHAIRMAN
WILLIAM A. MUNDELL
COMMISSIONER
JIM IRVIN
COMMISSIONER
JEFF HATCH-MILLER
COMMISSIONER
MIKE GLEASON
COMMISSIONER

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE COMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238
(Sub-Docket)

NOTICE OF FILING

The Arizona Corporation Commission Staff ("Staff") hereby files its Report and Recommendation in the 271 Sub-Docket which was established to address the issue of Qwest's alleged interference with the 271 Regulatory process. An original and 13 copies of the redacted version are submitted. Copies of the unredacted version are being provided to the parties who have executed an appropriate Protective Agreement.

RESPECTFULLY SUBMITTED this 6th day of May, 2003.

Maureen A. Scott

Maureen A. Scott
Attorney, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
Telephone: (602) 542-6002
Facsimile: (602) 542-4870
e-mail: maureenscott@cc.state.az.us

The original and thirteen (13) copies of the foregoing were filed this 6th day of May, 2003 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copies of the foregoing were mailed and/or hand-delivered this 16th day of May, 2003 to:

Charles Steese
Andrew Crain
QWEST Communications, Inc.
1801 California Street, #5100
Denver, Colorado 80202
Confidential version

Maureen Arnold
Director, Regulatory Matters
QWEST Communications, Inc.
3033 N. Third Street, Room 1010
Phoenix, Arizona 85012
Confidential version

Michael M. Grant
Gallagher and Kennedy
2575 E. Camelback Road
Phoenix, Arizona 85016-9225

Timothy Berg
Fennemore Craig
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85016
Confidential version

Curt Huttsell
State Government Affairs
Electric Lightwave, Inc.
4 Triad Center, Suite 200
Salt Lake City, UT 84180

Brian Thomas, VP Reg. - West
Time Warner Telecom, Inc.
223 Taylor Avenue North
Seattle, Washington 98109

Richard P. Kolb, VP-Reg. Affairs
OnePoint Communications
Two Conway Park
150 Field Drive, Suite 300
Lake Forest, Illinois 60045

Eric S. Heath
Sprint Communications Co.
100 Spear Street, Suite 930
San Francisco, CA 94105
Confidential version

Thomas H. Campbell
Lewis & Roca
40 N. Central Avenue
Phoenix, Arizona 85004
Confidential version

Andrew O. Isar
TRI
4312 92nd Avenue, N.W.
Gig Harbor, Washington 98335

Michael W. Patten
Roshka Heyman & DeWulf
One Arizona Center
400 East Van Buren, Suite 800
Phoenix, Arizona 85004
Confidential version

Charles Kallenbach
American Communications Services, Inc.
131 National Business Parkway
Annapolis Junction, Maryland 20701

Thomas F. Dixon
MCI Telecommunications Corp.
707 17th Street, #3900
Denver, Colorado 80202

Kevin Chapman
Director-Regulatory Relations
SBC Telecom, Inc.
300 Convent Street, Rm. 13-Q-40
San Antonio, TX 78205

Richard S. Wolters
AT&T & TCG
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
Confidential version

Joyce Hundley
United States Department of Justice
Antitrust Division
1401 H Street NW, Suite 8000
Washington, DC 20530

Joan Burke
Osborn Maledon
2929 N. Central Avenue, 21st Floor
P.O. Box 36379
Phoenix, Arizona 85067-6379
Confidential version

Scott S. Wakefield, Chief Counsel
Daniel W. Pozefsky, Esq.
RUCO
1110 West Washington, Suite 220
Phoenix, Arizona 85007
Confidential version

Rod Aguilar
AT&T
795 Folsom St., #2104
San Francisco, CA 94107-1243

Daniel Waggoner
Davis Wright Tremaine
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Confidential version

Raymond S. Heyman
Roshka Heyman & DeWulf
One Arizona Center
400 East Van Buren, Suite 800
Phoenix, Arizona 85004

Diane Bacon, Legislative Director
Communications Workers of America
5818 North 7th Street, Suite 206
Phoenix, Arizona 85014-5811

Diane L. Peters
Director-Regulatory Services
Global Crossing Telemanagement, Inc.
1080 Pittsford Victor Road
Pittsford, NY 14534

Karen L. Clauson
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402

Dennis D. Ahlers, Sr. Attorney
Eschelon Telecom, Inc.
730 Second Ave. South, Ste 1200
Minneapolis, MN 55402

Mark P. Trinchero
Davis, Wright Tremaine
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201

Kimberly M. Kirby
Davis Dixon Kirby LLP
19200 Von Karman Avenue, Suite 600
Irvine, CA 92612

Jacqueline Manogian
Mountain Telecommunications
1430 W. Broadway Road, Suite A200
Tempe, AZ 85282

Mark DiNunzio
Cox Arizona Telecom, L.L.C.
20401 North 29 Avenue, Suite 100
Phoenix, AZ 85027

Mark N. Rogers
Excell Agent Services, L.L.C.
PO Box 52092
Phoenix, AZ 85072-2092

Steven J. Duffy
Ridge & Isaacson P.C.
3101 N. Central Ave., Suite 1090
Phoenix, AZ 85012-2638

Jon Poston, Consumer Coordinator
ACTS
6733 East Dale Lane
Cave Creek, AZ 85331

Barbara P. Shever
LEC Relations Mgr.-Industry Policy
Z-Tel Communications, Inc.
601 S. Harbour Island Blvd., Suite 220
Tampa, FL 33602

Jonathan E. Canis
Michael B. Hazzard
Kelly Drye & Warren L.L.P.
1200 19th Street, NW, Fifth Floor
Washington, D.C. 20036

Ms. Andrea P. Harris
Sr. Manager, Reg.
Allegiance Telecom, Inc.
2101 Webster, Suite 1580
Oakland, California 94612

Gary Appel, Esq.
TESS Communications, Inc.
1917 Market Street
Denver, CO 80202

Todd C. Wiley Esq. for
COVAD Communications Co.
Gallagher and Kennedy
2575 East Camelback Road
Phoenix, Arizona 85016-9225

Harry L. Pliskin, Sr. Counsel
Covad Communications Co.
7901 Lowry Blvd.
Denver, CO 80230

Andrew D. Crain
Qwest Corporation
1801 California Street
Suite 4900
Denver, CO 80202
Confidential version

Lyndon Godfrey
AT&T
675 East 500 South
Salt Lake City, UT 84102

Deborah A. Amaral

Deborah A. Amaral
Assistant to Maureen A. Scott

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
CHAIRMAN
JIM IRVIN
COMMISSIONER
WILLIAM A. MUNDELL
COMMISSIONER
JEFF HATCH-MILLER
COMMISSIONER
MIKE GLEASON
COMMISSIONER

IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	))))))	Docket No. T-00000A-97-0238

Section 271 SUB-DOCKET – STAFF REPORT AND RECOMMENDATION

May 6, 2003

SECTION 271 SUB-DOCKET
STAFF REPORT AND RECOMMENDATION

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The issue of Qwest including regulatory non-participation clauses in settlement agreements with Competitive Local Exchange Carriers ("CLECs") originally arose in conjunction with the Commission Staff's review of several of the unfiled agreements in the Section 252(e) proceeding. Staff recommended bifurcation of this issue since it is unrelated to Qwest's obligations under Section 252(e) of the Telecommunications Act of 1996 ("1996 Act"), and is directly related to the Section 271 proceeding itself. The Hearing Division adopted Staff's recommendation to address the Section 271 non-participation clauses as a sub-docket to the Section 271 proceeding itself. Therefore, the Section 271 sub-docket was specifically set up to examine the issue of Qwest's interference with the Arizona Section 271 process and proceeding, through the use of non-participation and/or non-opposition clauses in secret agreements with certain CLECs.

2. The Staff determined through discovery directed to all certificated CLECs in the state, that agreements which contained language requiring non-opposition and/or support of Qwest's Section 271 application were executed between Qwest and the following three carriers: Eschelon Telecom, Inc. ("Eschelon"), McLeodUSA ("McLeod") and XO Communications ("XO"). In addition, a 60 day litigation stand-down provision was executed with Z-Tel Communications ("Z-Tel"), an active participant in the workshops on Qwest's Section 271 Performance Assurance Plan ("PAP") during the briefing phase of the Arizona PAP proceedings.

3. Information gathered by Staff shows that Qwest attempted to silence two of its largest wholesale competitors, among others, during critical timeframes of the Commission's proceedings. Qwest did this through secret agreements in which it made favorable and discriminatory concessions to these CLECs in return for <u>inter alia</u> the carrier's promise not to oppose the Qwest Section 271 application before the Commission and the FCC. Evidence submitted by Eschelon, shows that Qwest interpreted and enforced the language contained in its secret agreement with Eschelon regarding the Section 271 proceeding as a broad requirement that Eschelon could not participate in the Section 271 proceedings. Moreover, the evidence shows that Qwest used the agreement on several occasions to keep Eschelon from appearing in Section 271 workshops and Change Management Process ("CMP") proceedings where it would have brought issues to the Commission's attention which would have entered into the Commission's ultimate determination as to whether Qwest met certain Section 271 checklist requirements. McLeod, XO and Z-Tel were also bound by agreements, oral or written, to remain silent or neutral or to support Qwest's application for certain periods of time.

4. Given the nature of the Section 271 process and the Commission's role[1] in the Telecommunications Act of 1996 to consult with the Federal Communications Commission ("FCC") on whether or not Qwest meets the requirements of the 1996 Act and relevant FCC rules and

[1] Because of the 90 day statutory deadline applicable to its own review of these issues, the FCC has also asked States to develop an extensive factual record on whether the ILEC meets the various requirements of the 1996 Act. The FCC encourages States to use an open, collaborative process and gives the records of State commission's that have used such processes great weight.

regulations, the CLECs ability to freely participate in the process before the State commission is of paramount importance.

5. As a result of Qwest's conduct, the Staff held a supplemental workshop to allow those parties that felt they had been precluded from raising certain issues because of these agreements, to bring those issues forward for resolution. That workshop concluded at the end of July, 2002, and related Third Party Administrator work on those issues ended in late November and early December, 2002. Issues raised by CLECs which they were precluded from raising during the period of their non-participation and which, therefore, could negatively affect Section 271 results are listed in paragraphs 78 and 79 of this report. The evidence shows that Qwest intentionally prevented the carriers from raising issues that would have reflected adversely on Qwest's compliance with Section 271 requirements. These actions by Qwest could have disadvantaged competitors, and interfered with the integrity of the Commission's processes.

6. Because Qwest's conduct in entering into these non-participation clauses was done with intentional and willful disregard of the Commission's rules of process and Section 271 procedural orders, the Staff is recommending monetary fines under A.R.S. 40-424 in the amount of $7.42 million dollars. Staff believes penalties of this magnitude are appropriate given the egregious nature of Qwest's conduct; and the fact that its conduct adversely affected the integrity of the record in this case and interfered with the Commission's rules of process and Orders by precluding free and open participation by parties. The Staff is also recommending certain non-monetary penalties.

II. PROCEDURAL HISTORY

7. As already indicated, this issue first arose as part of the proceeding that was established to examine Qwest's compliance with Section 252(e) of the Telecommunications Act of 1996. Section 252(e) requires an Incumbent Local Exchange Carrier ("ILEC") such as Qwest to file all interconnection agreements between it and CLECs with the Commission for approval.

8. The Minnesota Department of Commerce filed a complaint against Qwest alleging that it had not filed certain agreements with the Minnesota Public Utilities Commission for approval under Section 252(e) of the 1996 Act. At Chairman Mundell's request, Qwest was directed to submit any and all unfiled agreements in Arizona to the Commission for review.

9. Around this same time, AT&T Communications of the Mountain States Inc. ("AT&T") filed a motion in the Section 271 proceeding, asking that the Commission examine the issue of Qwest's compliance with Section 252(e) of the 1996 Act in the context of Qwest's pending Section 271 application. Since Qwest's compliance with Section 252(e) raised issues which would be better addressed through an enforcement docket, Staff requested that these issues be addressed in a separate proceeding.

10. By ruling of the Commission dated April 18, 2002, it was determined that a separate docket would be used to examine Qwest's compliance with Section 252(e). Qwest filed copies of approximately 90 unfiled agreements with the Commission for review by the Staff. A procedural schedule was established which allowed all parties an opportunity to comment on the agreements and whether or not they were subject to the filing requirement of Section 252(e) of the 1996 Act. During this initial phase of the proceeding, extensive comments were filed by Qwest and AT&T

which urged a narrow versus a broad reading of the relevant provisions of federal law respectively. Limited comments were filed by the Residential Utilities Consumers Office ("RUCO") and Time Warner ("Time Warner"). Eschelon and McLeod did not file any comments on the issue.

11. Based upon the parties' comments and its own review of the agreements, Staff issued its Report and Recommendation to the Commission on June 7, 2002. In its Report, Staff identified approximately 25 agreements that it believed should have been filed by Qwest under Section 252(e) of the 1996 Act. Because there was nothing in the record at that time indicating that Qwest's conduct was intentional and willful, Staff recommended that the Commission assess penalties under A.R.S. 40-425 in the amount of $104,000.00, based on $3,000.00 per unfiled agreement, and $5,000.00 per agreement for the non-opposition clauses.

12. A Procedural Conference was subsequently held on June 19, 2002. At the Procedural Conference, Commissioner Spitzer directed Staff to conduct additional discovery of all CLECs operating in Arizona to determine the number of secret agreements and whether the secret agreements had tainted the Section 271 record. RUCO also raised the issue of oral agreements between Qwest and McLeod. In addition, RUCO opined that the Commission should examine the damage to competition and to other CLECs in the State.

13. As a result of the Procedural Conference, Staff did extensive discovery of all certificated CLECs in both the Section 271 proceeding and the Section 252(e) proceeding. Commissioners Spitzer and Irvin also sent letters to parties in the Dockets asking for comment on the impact of the secret agreements which contained non-participation clauses on the record of the Section 271 proceeding. Staff also sent a Notice to all parties in the Section 271 proceeding asking for comment on the effect of the non-participation clauses on the Section 271 record.

14. In response to Staff's request for comments on the effect of unfiled agreements on the Section 271 process, comments were submitted by AT&T, WorldCom, Time Warner, Eschelon, RUCO, and Qwest.

15. On October 4, 2002, Staff issued a Supplemental Report and Recommendation concerning Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996 (Docket No. T-00000A-97-0238). Staff recommended bifurcation of non-Section 252(e) related issues such that only the Section 252(e) compliance matters would be addressed in the enforcement docket as originally intended. The issue of non-participation in the Section 271 proceeding and its effect, as well as appropriate penalties for Qwest, would be addressed in a proposed Section 271 sub-docket. Staff recommended that the proposed sub-docket be concluded before the ACC made its recommendation to the FCC.

16. In its October 4, 2002 Report, Staff also found that the letters, comments and data request responses that were filed indicated that Qwest, with respect to at least two CLEC's, interfered with the Commission's Section 271 regulatory process, and that the record was incomplete as a result. In response to Staff's discovery, four parties, including XO, Eschelon, Z-Tel[2] and McLeod had agreements with Qwest which acted to limit their participation in the Commission's Section 271 proceeding. Two of these carriers, Eschelon and McLeod, stated that they had

[2] The Z-Tel Memorandum of Understanding ("MOU") contained a general 60 day litigation stand down commitment while the companies negotiated their interconnection agreements.

unresolved issues as a result of agreements with Qwest.[3] AT&T, WCom and Covad raised concerns about the non-participation of certain parties, and with the resulting impact on the Section 271 record.

17. On October 15, 2002, comments on Staff's Supplemental Report and Recommendation were filed by AT&T, WCom and Covad. AT&T, WCom and Covad all expressed concern with the record given the unfiled agreements and the non-participation of certain parties.

18. Staff held a Workshop on July 30-31, 2002, to address the concerns of parties, including Eschelon and McLeod, who believed they had been precluded from raising issues due to their agreements with Qwest. Other parties were allowed to participate to the extent they had issues which arose from the new evidence presented. Both Eschelon and McLeod raised issues during the workshop which they stated they had been precluded from raising during the course of the Arizona Section 271 proceeding because of written and oral agreements with Qwest, respectively.

19. Following the July 30 – 31, 2002 Workshop, Staff asked its Third Party Test Administrator to perform a data reconciliation of OP-5, Installation Commitments Met, one of the more critical performance indicators for CLECs, since Eschelon took exception to Qwest's performance reporting at the Workshop. CGE&Y completed its audit and issued its Report in early November, 2002. Parties filed comment on the CGE&Y Report which the Staff considered in its Report and Recommendation. On February 25, 2003, Staff issued a Report on the July 30 – 31 Workshop (Report One – Operations Support Systems (OSS) Related Issues). Included in this Report were Staff's recommended resolution for each of the OSS related Impasse Issues between CLECs and Qwest, including the OP-5 issue. A Second Report and Recommendation, addressing Checklist related issues covered during the July 30 – 31 Workshop is also being prepared by Staff.

20. The November 7, 2002 Procedural Order adopted Staff's recommendation to bifurcate issues unrelated to Section 252(e) compliance, from the Section 252(e) enforcement docket. Section 271 non-participation issues, including penalties, became the subject of a sub-docket to the Section 271 proceeding itself. The Hearing Division also adopted Staff's recommendation that all comments and evidence submitted on this issue would automatically become part of the sub-docket record. All parties, including Qwest, would have an additional opportunity to put further evidence into the record.

21. A November 26, 2002 Procedural Order sought comment on Staff's proposed procedures for the Section 271 sub-docket as set forth in the October 4, 2002 Staff Report, including the need for hearing in the sub-docket, no later than December 10, 2002.[4]

22. On December 10, 2002, RUCO filed comments stating that it had no objection to the recommended procedure for the Section 271 sub-docket set forth in Staff's October 4, 2002 report. Also, on December 10, 2002 Qwest filed comments on Staff's proposed process for the Section 271 sub-docket and agreed with Staff's proposed procedures. AT&T filed comments on the Supplemental Staff Report and Recommendation on October 11, 2002. In its Comments, AT&T stated that it did not object to Staff's recommendation to open a sub-docket to examine whether Qwest interfered with the Section 271 process and appropriate penalties.

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[3] McLeod initially said it had no remaining unresolved issues. However, at the subsequent Workshop, it stated it had many of the same unresolved issues as Eschelon.

[4] Procedural Order Dated November 26, 2002, Page 2.

23. A December 20, 2002 Procedural Order scheduled a Procedural Conference for the purpose of discussing modification of the hearing schedule and any other procedural issues the parties had. It also stated that the procedural schedule established in the November 7, 2002 Procedural Order would be suspended, pending the discussion scheduled for December 30, 2002.[5]

24. The December 20, 2002 Order gave all parties until January 10, 2003 to submit additional evidence on the impact, if any, of certain parties inability to participate in the Section 271 process. It further ordered that Qwest file any responsive pleadings within 10 days after any parties filing. Finally, it further ordered that following comments by the parties and any Qwest response, Staff shall submit its Report and Recommendation to the Commission as to the amount of additional fines or other remedies the Commission should impose on Qwest.

25. Parties filing comments on January 10, 2003 included AT&T, WorldCom and RUCO. Qwest filed responsive comments on January 20, 2003.

26. Following is Staff's Report and Recommendation on the issue of Qwest's interference with the Section 271 regulatory process.

III. SUMMARY OF COMMENTS AND EVIDENCE SUBMITTED

A. CLECs' Position

27. Substantial comments and evidence were submitted on the issue of Qwest's use of non-participation clauses to interfere with the Section 271 regulatory process by several CLECs which had non-participation agreements with Qwest, and others which had actively participated in the process, but believed that the process and record would have been much more complete but for the non-participation clauses. Those submitting comments and/or evidence on this subject at various times on this issue included Eschelon, McLeod, AT&T, RUCO, WorldCom, Time Warner, Covad and Qwest.

28. In Question No. 4 of Staff's Second Set of Data Requests to all certificated CLECs in Arizona, Staff asked whether the carrier had entered into any agreements with Qwest, either written or oral, which had precluded the carrier from participating in this proceeding. If the answer was "yes", the carrier was asked whether there were any issues that it had been precluded from raising that had not yet been resolved through the participation of other parties.

29. Of the CLECs that responded, three (Z-Tel, Eschelon and McLeod) stated that they had entered into agreements that limited their participation in the Qwest Section 271 proceeding.[6] McLeod responded that: "Although it was not clear to McLeod that the following 'limited' its ability to participate in any particular proceeding, McLeod stated that it had orally agreed to remain neutral on (neither support nor oppose) Qwest's Section 271 application as long as Qwest was in compliance with all our agreements and with all applicable statutes and regulations." McLeod stated that it did not have any agreement to stay out of all Qwest-related proceedings.

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[5] Procedural Order Dated December 20, 2002, Page 4.

[6] While only three indicated in their responses to Staff data requests that they had entered into agreements with Qwest that limited their participation to some extent in the Section 271 case, Staff also found an agreement between Qwest and XO with similar provisions which required XO to stipulate that Qwest was in compliance with Section 271 requirements.

30. Z-Tel advised that they had agreed to not participate in Section 271 proceedings for a period of 60 days while they were negotiating interconnection agreements with Qwest in 8 states.

31. One CLEC, Eschelon, answered with an unqualified "yes" and provided substantial comment on the fact that they had a signed unfiled contract in which they had agreed not to oppose Qwest in its Section 271 proceedings at the State commissions.

32. A total of four CLECs (Eschelon, Covad, AT&T and WorldCom) responded that they were aware of Section 271 issues that they believed were not adequately addressed in the Arizona proceedings as a result of Qwest's unfiled agreements with CLECs.

33. The agreement between Qwest and Eschelon was executed on November 15, 2000, and provided in relevant part as follows:

> "During the development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements."

See Exhibit A attached.

34. In its June 24, 2002, letter to Commissioner Spitzer, Eschelon stated that Qwest required it to drop out of the Section 271 proceedings before its issues could be resolved.[7] See Exhibit B attached. Eschelon stated that its problems were not all resolved. Eschelon further stated that the November 15, 2000, agreement with Qwest required Eschelon's silence. Eschelon further stated that despite its arguments to the contrary, Qwest interpreted the agreement more broadly than not opposing Qwest and said that it required Eschelon not to participate in the Section 271 proceedings. Eschelon also stated that because Qwest required confidentiality and did not disclose the November 15, 2000, Escalation Letter, Qwest was able to create the impression that problems with Qwest's commercial performance were solved when all of them were not. Eschelon stated that it had many service problems, access and billing problems, and other issues with Qwest's commercial performance throughout the course of the Arizona Section 271 proceeding. Eschelon further stated that Qwest was aware of these problems, through many discussions with Eschelon, as

[7] See also, February 8, 2002, Letter from Richard A. Smith of Eschelon to Joseph P. Nacchio of Qwest. (Exhibit C attached). ("Before Qwest would resolve previous legitimate business disputes that were pending late in 2000, Qwest required Eschelon to agree not to oppose Qwest in Section 271 proceedings. ...Qwest has gone so far as to try to make resolution of legitimate business issues contingent upon our destruction or surrender of an auditor's documents as well as to require us to submit testimony, regardless of its validity, in legal proceedings if "suitable" to Qwest.") p. 2. See also pps. 4-6. See also July 10, 2002, Letter from Eschelon to Commissioners Irvin and Spitzer. (Exhibit E attached). (Qwest representatives "generally took the position that the Escalation Letter barring Eschelon from participating in Section 271 proceedings also entailed that Eschelon should either be silent or support Qwest's position on other issues in the CMP monthly and Re-design processes. Qwest said that Eschelon had an obligation to deal directly with Qwest executives instead of raising issues in the CMP arena. Eschelon did not believe, however, that Qwest could separately address the types of issues Eschelon raised in those proceedings without affecting other CLECs and that consequently a bilateral approach would be futile.") p. 6. ("There is a correlation between the timing of Eschelon's assertion of its various rights and Qwest's stopping of the payments.") July 10, 2002, Letter at p. 10. See also July 10, 2002 Letter, at p. 15. (At the multi-state SGAT workshop held in Denver April 30-May 2, 2001, Qwest representatives "told Ms. Clauson in no uncertain terms that she should not be present.").

well as through monthly Report Cards provided by Eschelon to Qwest during that time. See Exhibit D attached.

35. Eschelon could not raise these issues to the Arizona Corporation Commission ("ACC"), however, because Qwest continued to hold Eschelon to the requirement that Eschelon not oppose Qwest in Section 271 proceedings.[8] Eschelon stated that although it was dissatisfied in several respects, pursuant to the November 15, 2000, Escalation Letter, Eschelon was not "free to say so, to the ACC or to anyone else." Eschelon also stated that it would have participated more fully in CMP, if Qwest had not exerted pressure on Eschelon not to do so. Eschelon further stated that Qwest had Eschelon representatives pulled from CMP Re-Design meetings; reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report; required Eschelon to withdraw a Change Request relating to anti-competitive conduct before it was distributed to other CLECs; and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming public.

36. Throughout all of its various filings, Eschelon reiterated that Qwest interpreted the agreement more broadly than not opposing Qwest, and said that Qwest required Eschelon not to participate in the Section 271 proceedings. Eschelon stated that the relevant time period of non-participation was November 15, 2000, through February 28, 2002.

37. Eschelon also made reference to Qwest objecting to Eschelon raising publicly any problems with commercial performance. Eschelon argued that it could participate in SGAT proceedings to gain input into the wording of the SGAT without submitting evidence of problems with commercial performance. According to Eschelon, Qwest took the position that Eschelon's participation in Section 271 SGAT related proceedings would breach the November 25, 2000 Escalation Letter. On one occasion when Eschelon's representative later attended a multi-state Section 271 workshop in Denver, Eschelon stated that Qwest objected and said she should not be there.

38. McLeod stated that in October, 2000, it orally agreed to remain neutral (neither support nor oppose) Qwest's Section 271 application as long as Qwest was in compliance with all of its agreements and with all applicable statutes and regulations. See Exhibit F. In its responses to Staff data requests, McLeod stated that it did not know what, if any, issues would have been raised in the absence of the oral agreement. However, at the workshop held on July 30-31, 2002, McLeod raised several issues and stated that but for the oral agreement, it would have raised these issues earlier in the Section 271 proceeding. It also stated that it shared some of the same problems as Eschelon.

39. McLeod stated that it petitioned to intervene in the Arizona Section 271 proceeding on April 22, 1998. On February 26, 1999, McLeod stated that it petitioned to withdraw from the Arizona Section 271 docket, which petition was granted on March 18, 1999. McLeod stated that to the best of its recollection, its withdrawal was due to a desire to avoid resource commitments associated with responses to discovery requests, in light of very limited business at the time.

[8] See also July 10, 2002, Letter from Eschelon to Commissioners Irvin and Spitzer. See Exhibit E. ("Despite Qwest's sweeping claims to the contrary, Eschelon could not, consistent with its obligations, file complaints before any regulatory body regarding quality of service, pricing, discrimination, or any other issue arising under the interconnection agreement during negotiations or afterward.") p. 12.

40. In a Memorandum of Understanding with Qwest, Z-Tel agreed not to participate in any commission proceedings for 60 days. See Exhibit G attached. The 60 day period began on May 18, 2001 and ended on July 17, 2001.

41. In response to Staff's Third Set of Data Requests, Z-Tel stated that it actively participated in the Arizona PAP workshops from third Quarter 2000 through 2001. It also stated that it had raised many issues in that proceeding concerning PIDs, penalty caps, change management procedures, root cause analysis, the K-Table and the minimum per occurrence penalty.

42. In response to Staff's Fourth Set of Data Requests, XO stated that while it had intervened in the Section 271 proceedings in Arizona, it did not actively participate. XO also stated that its affiliates actively participated in Section 271 proceedings only in those states in which they had sufficient experience with Qwest, and in which they sought to raise and seek resolution of state-specific issues, based on that experience. XO also stated that it had only begun providing service in Arizona when the Section 271 proceedings began and thus chose not to participate actively in those proceedings.

43. However, on December 31, 2001, XO entered into an agreement with Qwest in which it agreed to stipulate that Qwest was in compliance with Section 271. See Exhibit H attached.

44. Several other parties also alleged that the process was harmed by the inability of these carriers to participate. Covad stated that the fact that other parties were not able to participate made it more difficult for those parties that remained in the proceeding because: (1) not all issues would be raised and, potentially resolved; and (2) the ability to share responsibility for issues would be eliminated. WorldCom indicated that the Commission needed to get answers to the following questions: (1) whether Qwest engaged in a pattern of conduct to silence competitors actively in business in Arizona and Qwest territory by entering into unfiled agreements; and (2) whether Qwest attempted to limit Eschelon's, McLeod's, XO's or any other CLEC's participation in CMP redesign because of unfiled agreements with Qwest.

45. AT&T stated that Qwest's actions had the following impacts: 1) the Commission was led to believe that only AT&T and the long distance carriers had objections to Qwest's Section 271 application, and the long distance carriers' motive was simply to keep Qwest out of the long distance market; 2) Qwest's suggestion that small CLECs doing business had no complaints, as evidenced by their lack of participation in the Section 271 proceeding, was inaccurate; and, by keeping the agreements secret, no evidence was available to contradict Qwest's assertions; 3) by not filing the agreements, the nature and extent of the problems being encountered by CLECs were kept out of the record and public eye; 4) the record was not fully developed, as evidenced by Eschelon's decision to pull out of the UNE-P workshops, leaving earlier problems raised by Eschelon unresolved; 5) favorable treatment provided to certain CLECs may have affected individual CLEC performance for the better, resulting in an inaccurate picture of actual CLEC performance data and affecting overall conclusions in the OSS test because of the reliance on commercial data by the Test Administrator to make findings of parity; and 6) the data reconciliation audit conducted by the Liberty Consulting Group may have been less extensive because of the lack of full CLEC participation.

46. On January 8, 2003, AT&T claimed that issues raised in the July Workshop reflected those that went unaddressed and unresolved because of provisions in a secret agreement to prevent certain CLEC's from participating in the Section 271 process. It further stated that Staff reports are relevant to the issues in the sub-docket because the reports will reflect numerous issues that were not addressed in the Section 271 process and remained unresolved because of CLEC's inability to participate.

47. WorldCom generally concurred with the comments filed by AT&T on the October 4, 2002 Supplemental Staff Report and Recommendation.

48. RUCO also submitted comments at various times on the issues raised herein. RUCO stated that, to date, the Commission has not received full disclosure of the facts. RUCO also stated that full disclosure gives the Commission and every interested party an opportunity to make a judgment about whether the agreements have infected the Commission's record. Without full disclosure the process remains compromised. For that reason, RUCO believed the side agreements have tainted and will continue to taint the integrity of the Section 271 proceeding.

49. RUCO stated that the Section 252(e) record will undoubtedly include facts and raise issues on Qwest's interference with the Section 271 process not yet known, and/or considered in Staff's report. Without knowing the results of the Section 252(e) process, RUCO stated that it is difficult if not impossible to determine what procedure the Commission should consider in deciding how the conduct to be examined in the Section 252(e) docket interfered with the Section 271 process, and the extent to which Qwest should be penalized.[9]

50. RUCO also stated that, for competition to have a chance, the Commission must be allowed to do its job to ensure that Qwest is not permitted to use its superior market power against its competitors. It further stated that for the past three years this Commission has been engaged in the Section 271 process and, for the most part, was approving the necessary checklist items mandated by the Act. While Qwest was making its case and assuring the Commission that it was in compliance with the various Checklist Items required by the Act, it was embroiled in a bitter dispute with Eschelon, one of its largest wholesale resellers. The dispute focused mainly on terms of interconnection agreements which the parties agreed would not be brought before this Commission. RUCO stated that McLeod was also experiencing difficulties arising out of its Interconnection Agreements with Qwest through the Summer of 2001.

51. RUCO further stated that at least since October 2, 2000 which covers a portion of the Section 271 process, Qwest was secretly providing Eschelon and McLeod with terms it intentionally did not make available to other CLECs. RUCO stated that in exchange for Qwest making such terms available, Eschelon and McLeod were required to agree to cease participating in the Commission's Section 271 approval process. Although McLeod and Eschelon continued to experience difficulties, they were prevented from making these difficulties known to the Commission in the Section 271 proceeding. RUCO further stated that it appeared from the evidence that Qwest gave little or no thought to this Commission and the possible consequences of its illegal activity.

52. RUCO further stated that Qwest exploited its monopoly power to make sure that Eschelon did not divulge to this Commission the on-going service problems it was experiencing with

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[9] RUCO's Comments regarding proposed procedures for the Section 271 Sub-Docket, dated December 10, 2002.

Qwest. RUCO cited several instances in which Qwest asked that Eschelon refrain from active participation and an instance where it allegedly requested Eschelon to destroy evidence of Qwest's access billing problem, including an auditors report. RUCO stated that this is corroborated in a confidential billing settlement agreement sent to Eschelon on October 30, 2001, which was signed by Qwest, but not by Eschelon.

53. RUCO further stated that in the confidential purchase agreement dated October 30, 2001 sent to Eschelon with the settlement agreement, Qwest required that Eschelon refrain from participating in or initiating any proceeding before this Commission where Qwest's interests may be implicated. This purchase agreement was signed by Qwest, but not by Eschelon.

54. RUCO stated that Qwest was able to exploit its monopoly power over Eschelon because of its superior market position. RUCO further stated that herein lies the true impact on competition; the playing field is not level and this Commission never had the chance to level the playing field.

55. RUCO stated that it is important that the CLEC feel that it can negotiate with the ILEC at arms length and to know that they can depend on the Commission if the ILEC manipulates its monopoly power. Likewise, RUCO stated, the CLECs as well as the ILEC have to know that there will be significant consequences if they allow either or both to manipulate the market.

56. RUCO stated that the primary adverse impact of Qwest's actions was to damage the regulatory process, frustrating this Commission's attempts to implement the 1996 Telecom Act. It stated that a most obvious remedy would be to dismiss the Section 271 review proceeding, wipe the record clean, and start the entire process over with full knowledge of the secret agreements, but acknowledged that this would be impractical. RUCO stated that it believes it is possible to fashion a remedy for Qwest's actions that strengthens the regulatory process by helping the Commission do a more effective job of implementing the 1996 Telecom Act.

57. RUCO recommended establishment of a two-part fund designed to facilitate arbitrations between Qwest and CLECs, and to assist the Commission in policing the 1996 Telecom Act and facilitating the transition to effective competition.[10] A monetary aspect of this recommendation includes an initial contribution by Qwest of $750,000 into each part of the fund. Thereafter Qwest would be required to annually contribute an amount to be determined by the Commission each year, but the minimum annual amount contributed to each part of the fund would be not less than $500,000 and not more than $950,000. The life of this fund would be a minimum of five years and not more than seven years. This leads to a total contribution by Qwest of at least $6.5 million over five years but not more than $14.3 million spread over seven years.

B. Qwest Response

58. Qwest stated that only two agreements contained provisions concerning the CLEC's participation in Section 271 proceedings: (1) the December 31, 2001, Confidential Billing Settlement Agreement with XO Communications, Inc., and its subsidiaries; and (2) the November 15, 2000, Confidential Billing Agreement with Eschelon.

[10] A detailed description of RUCO's recommendation is located on pages 5-7 of RUCO's Comments Concerning the Section 252(e) proceeding, dated January 10, 2003. This penalty was also recommended by RUCO in the Section 252(e) proceeding.

59. With regard to the XO agreement, Qwest stated that it and XO had billing disputes as well as disputes about reciprocal compensation and the methods for measuring paging, ISP-bound traffic, and non-ISP-bound traffic. The agreements resolved those disputes. Qwest further stated that recognizing the obligation to make certain of the resolutions available to all similarly situated carriers the agreement provided that amendments to the Qwest-XO interconnection agreements in Arizona and five other states would be filed within 15 business days of the execution of the agreement. The amendments were filed as an amendment to the parties' interconnection agreement on April 3, 2002, and they therefore became available to other CLECs on July 2, 2002. Qwest stated that as part of the resolution of those issues, XO agreed to stipulate to the appropriate state and federal regulatory agencies, that Qwest complies with the Section 271 Checklist Items in Arizona, Colorado, Oregon, Minnesota, Utah, and Washington.

60. Qwest acknowledged that it entered into agreements with Eschelon and McLeod that contained provisions whereby those CLECs agreed not to oppose Qwest's Section 271 application. For a period of time while those agreements were in effect, Eschelon or McLeod either did not participate in the Arizona Section 271 process or limited their involvement in that process.

61. As for the Eschelon agreement, Qwest stated that it is inappropriate to suggest that Qwest at any time forced Eschelon to remain silent on Section 271-related issues. Qwest stated that Eschelon decided, of its own free will, to work with Qwest to resolve the business issues between them. Qwest stated that Eschelon could have decided at any point in the negotiation process that it did not wish to enter into an agreement with Qwest and instead wished to pursue its claims through regulatory processes, including Section 271. Qwest further stated that even after the agreement was signed, if Eschelon believed that Qwest was not living up to its commitments in the agreement, Eschelon could have sought redress through regulatory or legal avenues. Qwest stated that any suggestion by Eschelon that Qwest could, or did, prevent Eschelon from participating in the Section 271 process is simply baseless. Further, Qwest stated that the agreement served the interests of Section 271, because its purpose was to develop an implementation plan that would address issues raised by Eschelon in negotiations and improve the provisioning process for all CLECs.

62. In its June 18, 2002 Letter to Commissioner Spitzer, Qwest reiterated that the purpose of its negotiations with CLECs was to resolve the issues that a CLEC might otherwise have raised in the Section 271 proceeding. Qwest noted that, on November 3, 2000, Eschelon informed the Commission and all parties in the Section 271 docket that it was working with Qwest to resolve its provisioning issues. Qwest cited the following passage from Eschelon's letter: "Eschelon will continue to have discussions with Qwest to try to resolve these issues, but will participate in the workshop currently scheduled for November 29 through December 1 if sufficient progress is not made before that time." Qwest also stated that Eschelon did, in fact, actively participate in the Section 271 CMP. Qwest stated that of the forty-four CMP redesign core team meetings, Eschelon participated in thirty-nine. Qwest also stated that of the 192 systems change requests from CLECs, Eschelon submitted sixty-six. Qwest also stated that Eschelon submitted fifty-four, or fifty percent, of the 108 product and/or process change requests.

63. On October 15, 2002, Qwest pointed out that the FCC issued an order setting forth the standard to apply and to determine whether negotiated contractual agreements between ILECs

and CLECs should be filed with the Commission for approval.[11] Qwest stated that Checklist Item 2 was a resolved issue: The question is whether Unbundled Network Elements are and will be available on a non-discriminatory basis Qwest agreed to abide by this standard when making the determination as to what agreements should be filed publicly for approval by the Arizona Commission. In addition, Qwest has agreed as part of the Section 252(e) docket, to take extensive measures to ensure the controversy over unfiled agreements does not recur. Further, Qwest stated that because the FCC has now set the standard for filing of agreements, and Qwest has agreed to comply with that standard both in the future and as to the past unfiled agreements, there is no Checklist Item 2 issue to be resolved.

64. Qwest further stated that in the Public Interest phase of Section 271, the emphasis should be on whether the telecommunications market is open on a going-forward basis and whether future interLATA competition is in the public interest – not on past conduct which can be subject to appropriate penalties in either the Section 252(e) docket or a Section 271 sub-docket. See 47 U.S.C. §Section 271(c). Finally, Qwest stated that it agreed with Staff's analysis that, to the extent they have not already been addressed by Qwest, the concerns expressed by parties to this Docket and by the Commission regarding Qwest's past conduct will be adequately dealt with in separate enforcement proceedings, and thus the Section 271 proceeding need not be held in abeyance indefinitely. The Commission will presumably adopt remedies in those proceedings which will be in furtherance of the public interest.

65. Qwest objected to RUCO's allegation that Qwest coerced Eschelon into entering into the non-participation clauses using its market power over Eschelon. Qwest states that this is not true, it is not supported by the evidence, and forms no part of the findings made by the Minnesota Commission, to which RUCO had referred. It stated that the settlement agreements at issue were made voluntarily with the full consent of both parties.

66. Qwest also took exception to RUCO's reference to agreements that were never entered into between the parties, regarding Qwest's alleged coercion of Eschelon. It stated that despite RUCO's allegations of market power and coercion, Eschelon simply did not agree with Qwest on the proposed agreements referenced by RUCO and did not sign them. Therefore no agreement was ever made between the parties in these instances, as alleged by RUCO.

67. Qwest stated that in this Section 271 sub-docket, the stated purpose is to determine "what action the Commission should pursue with respect to the allegations that Qwest interfered in the Section 271 regulatory process." Thus, the proper scope of this proceeding is, therefore, what, if any penalty should be imposed.

68. Qwest stated that RUCO's penalty fund recommendation is not appropriate, and duplicates remedies that already exist as a result of the Section 271 process, or that are more properly part of the Section 252(e) proceedings. Qwest contends that RUCO's suggestions for the use of the proposed fund, to monitor competitive conditions and to investigate and resolve issues related to the Telecom Act and the transition to competition including ILEC – CLEC disputes, and to offset the costs of CLEC participation in similar regulatory proceedings is redundant with other remedies. Qwest referred to the already approved Performance Assurance Plan as part of its Section 271

[11] *In the Matter of Qwest Communications International, Inc. Petition for declaratory ruling on the Scope of the duty to file and obtain prior approval of negotiated contractual arrangements under Section 252(a)(1),* WC Docket No. 02-89, Memorandum Opinion and Order (rel. October 4, 2002).

application, which will provide for Tier 2 payments to offset the Commission's costs associated with: 1) administering the PAP, including Long-Term PID Administration, 2) monitoring post-entry compliance, 3) resolving disputes, 4) auditing costs and 5) assessing proposals in any state or federal service quality proceeding.

69. Qwest accepted responsibility for the non-participation clauses in the agreements with Eschelon and McLeod.[12] It referenced the Staff proposed fines under A.R.S. §40-424 relative to agreements with Eschelon, McLeod and others that contained clauses whereby CLECs agreed not to oppose the U S WEST/Qwest merger and which prevented them from participating in the Section 271 process. It stated that the July 2002 workshop enabled CLECs to file whatever evidence they think necessary or appropriate in completing the Section 271 application process. Qwest also stated that it has already agreed to implement numerous remedial measures to address Commission concerns, and referenced its December 23, 2002 Supplemental Comments to its Motion to Reconsider the Procedural Order. Since the December 23, 2002 Supplemental Comments by Qwest have previously been referenced in this report the remedial measures contained therein are not repeated here. In concluding its comments relative to RUCO's recommendations, Qwest stated that there is simply no reason to install a third penalty and enforcement measure for future CLEC grievances.

70. Qwest stated that in order to balance between impinging upon the ACC's regulatory oversight and the settlement of cases, Qwest will file all settlement agreements in "any proceeding with generic application" on a going-forward basis. Qwest stated that this will allow the Commission to review the terms of such settlements and assure itself that they are consistent with the public interest.

VI. STAFF DISCUSSION AND RECOMMENDATION

71. After considering all of the comments, letters, data responses and filings by the various parties, Staff believes that the record contains substantial evidence that Qwest interfered with the Section 271 regulatory process by requiring a nonparticipation clause in its agreements with certain CLECs precluding participation by CLECs which otherwise would have participated and brought concerns regarding Qwest's provision of wholesale service to them.[13] Additional concerns with Qwest's wholesale service provisioning would have been reflected in the record but for the non-participation of certain CLECs. Moreover, certain of these CLECs, Eschelon and McLeod, were two of Qwest's largest wholesale customers at the time. The completeness of the Commission's Section 271 record was adversely affected as a result.

72. The type of information that could have been provided by Eschelon and McLeod in particular is critical in the Section 271 investigation, where the Commission is required to perform a consultative role with the FCC on whether Qwest meets the requirements of Section 271 of the 1996 Telecommunications Act and the Competitive Checklist Items. The evidence suggests that Qwest's

[12] Qwest Corporation's, January 20, 2003 Response to AT&T's and RUCO's Comments of January 10, 2003 in the Section 271 Sub-Docket, Page 6.

[13] Staff incorporates by reference all filings, letters, pleadings, affidavits and other submissions concerning the issue of Qwest's interference with the 271 regulatory processes that were submitted by parties in both the 271 and 252(e) proceedings.

conduct was intentionally designed to prevent certain carriers from raising issues which would have reflected adversely on Qwest's compliance with Section 271 requirements.

73. The FCC relies heavily upon the records developed by State commissions in carrying out its responsibilities under the 1996 Act. If competitors are precluded from bringing evidence forward which would otherwise demonstrate that the ILEC was not in compliance with Section 271 requirements, a great injustice occurs and Qwest's competitors are severely disadvantaged in the end. Moreover, the integrity of this Commission's processes is compromised, resulting in parties losing faith in the process, and the end result of the process being misrepresented.

74. The Commission's rules of process allow all interested parties to intervene and participate in proceedings before the Commission. R14-3-104 provides that: [a]t a hearing, a party shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding. Qwest's conduct in the Section 271 proceeding prevented certain CLECs from introducing evidence in the proceeding, making arguments in support of their position, from examining and cross-examining witnesses, and from generally participating in the conduct of the proceeding.

75. The FCC's Section 271 rules of process rely upon the State commission's development of a comprehensive factual record where all interested and affected parties have been able to introduce evidence as to relevant issues. The Commission's Section 271 procedures were specifically designed to create a very open, collaborative process resulting in the development of a comprehensive record that the FCC could rely upon. See, e.g. December 8, 1999, Procedural Order which, inter alia, sets forth separate processes for the review of disputed Checklist Items versus undisputed Checklist Items.

76. Based upon the evidence presented by certain CLECs, Staff believes that Qwest interfered with these processes by requiring Eschelon and McLeod and others to remain silent on issues they would have otherwise brought to the Commission for consideration in whether Qwest had met all of the Checklist requirements. As already indicated, Eschelon and McLeod both have significant experience processing wholesale orders with Qwest. Thus, their participation in the Section 271 proceeding was important to the development of a complete record.

77. Eschelon was a very active and vocal participant in the Arizona Section 271 Checklist workshop on UNE-P held on October 17-18, 2000. At that first workshop, it raised many problems that it was experiencing with Qwest's UNE-P product offering. Soon after the first workshop, it notified the Commission that it would no longer be participating in the proceedings but instead was trying to work out its problems independently with Qwest. This occurred at the same time that Qwest and Eschelon entered into one of their agreements, which was on or about November 15, 2000. Eschelon was not in attendance at the next UNE-P workshop held on November 13-17, 2000. In fact, Eschelon did not participate again in the Arizona Section 271 proceedings until early 2002, almost a year and one-half later.

78. The fact that Eschelon had issues which it was precluded from raising is apparent from the following list of issues it later submitted to Staff to be addressed at the Supplemental Workshop held by Staff on July 30-31, 2002. The purpose of the July workshop held by Staff was to allow any CLEC the opportunity to raise any issue which it believed it had been precluded from

raising due to an unfiled agreement with Qwest. At that Workshop, McLeod stated it shared in Eschelon's issues for the most part. The issues raised by Eschelon included:

a. Release 10.0 was preventing CLEC-to-CLEC Orders

b. Any telephone number coming from a 1FB with CCMS (Customer Calling Management System), Centrex 21, Centrex or Centron for conversion to UNE-P or Resale POTS will not flow through

c. The GUI process is cumbersome and will remain so as long as it continues to rely on so many manual processes

d. Qwest is dispatching technicians for orders that do not otherwise generally require a dispatch

e. Qwest does not have back end system records containing the DSL technical information needed for repair of Centron/Centrex Plus lines with DSL

f. Eschelon experiences inordinate delay when Qwest disconnects the customer's DSL in error

g. When Eschelon converts a customer from Qwest to Eschelon, Qwest at times disconnects the customer's DSL early

h. Qwest has no process to migrate an existing CLEC customer (e.g., on resale or UNE-Star) with DSL to UNE-P without bringing the DSL service down

i. Outages of Qwest's ordering tool must be incurred to obtain information needed by Eschelon to complete DSL installations

j. When Qwest provides repair services to its retail customers, Qwest provides a statement of time and materials and applicable charges to the customer at the time the work is completed, but does not do so for its wholesale customers

k. There have been instances where Qwest is providing a US WEST branded statement to Eschelon's end-user customers and requires them to sign it

l. Eschelon is not receiving timely bills for maintenance charges

m. Qwest does not include sufficient information on its bills for Maintenance and Repair work. For instance, Qwest does not include circuit identification information on Eschelon's bills, and also does not include the date of the dispatch or trouble repair

n. Qwest closes trouble tickets without authorization and with the incorrect cause and disposition codes

o. Eschelon incurs additional testing charges due to Qwest's use of pair gain

p. Eschelon and other wholesale customers do not receive accurate customer loss information. Qwest's retail side does receive accurate customer loss information

q. There is inadequate notice of rate and profile changes

r. Qwest charges rates that are not in Eschelon's Interconnection Agreements

s. There are problems with billing accuracy

t. There are problems with Qwest changing its PID reporting procedures without adequate notice to the CLECs

u. Qwest was not providing complete and accurate records to Eschelon to bill interexchange carriers access charges

v. There are collocation issues

w. There are CMP problems

x. There are tandem failure events.

79. McLeod raised three additional issues:

a. Qwest's failure to bill McLeod correctly under its Fourth Amendment to the Interconnection Agreement

b. Qwest's failure to make payments required under various agreements

c. Other performance issues that arise in the Workshop discussions.

80. Staff issued its First July 30-31, 2002 Workshop Report on Operations Support Systems related issues on February 25, 2003. It will be issuing a Second Workshop Report on Checklist related issues in the very near future.

81. Z-Tel was a very active participant in the Arizona PAP workshops. The Company entered into a two month Stand-Down Provision during the briefing stage of those workshops. Z-Tel submitted an initial brief jointly with WorldCom on May 11, 2001. The stand-down agreement was executed on May 18, 2001. Z-Tel did not participate in the Reply Brief stage, nor did it participate in the PAP open meeting.

82. XO (f/n/a Nextlink) participated in proceedings to develop the Performance Indicator Descriptions ("PIDs") in Arizona. It also submitted comment in response to the Commission's initial request for comment on Qwest's compliance with the various Checklist Items. Thereafter, XO did not participate at all in the Arizona proceedings. While the Company stated in response to Staff data requests that it chose not to participate because it did not have a large presence in Arizona, it did not acknowledge the existence of the agreement with Qwest, and thus Staff can only assume that the Company representatives responding to the data requests were unaware of the agreement with Qwest. The extent to which XO would have participated but for the agreement with Qwest is not known and would be difficult to predict. It must be assumed that it had some impact, however, on the Company's decision to not participate at all throughout the remainder of the 271 proceeding in Arizona.

83. Qwest acknowledged at the December 13, 2002 Procedural Conference and in its December 23, 2002 filing, that although the original wording of agreements used the term "non-opposition", these agreements were indeed interpreted to mean "non-participation" in the Section

271 proceeding.[14] Further, as stated in paragraph 69 of this report, Qwest accepted responsibility for the non-participation clauses in the agreements with Eschelon and McLeod. As a result, Qwest implicitly, if not explicitly, acknowledged that it has interfered with the Arizona regulatory process.

84. The penalties proposed by Staff herein are intended to penalize Qwest for past transgressions; specifically, for precluding participation by some CLECs in Qwest's Section 271 proceeding; thereby interfering with the Arizona Commission's Section 271 regulatory process. They are also intended to be an incentive to Qwest to ensure that similar transgressions do not occur in the future. In order to accomplish this, Staff believes that both non-monetary and monetary penalties should be assessed.

85. With regard to non-monetary penalties, Staff refers to Qwest's filing dated December 23, 2002 containing its Supplemental Comments to its Motion to Reconsider Procedural Order. Qwest should be required to implement and abide by each of the statements made in this December 23, 2002 filing, specifically addressing each to Arizona, including:

- In Minnesota, Qwest offered an Independent Auditor to review the Agreement Screening Committee's work.[15]

- Qwest also agreed, in its December 13, 2002 filing to file all settlement agreements in any proceeding with generic application, on a going forward basis.

- Qwest has created a team of people to review all agreements with CLECs and apply the FCC standards to ensure that all agreements are properly filed going forward.

86. Qwest should also be prohibited from including any language in future Interconnection Agreements, or in any other verbal or written agreements or otherwise binding documents which limit CLEC participation in Arizona proceedings, prohibit CLECs from filing complaints with the ACC, or in any other way infringe on CLEC rights and/or interfere with normal Arizona regulatory proceedings. Should such language recur in the future, significant monetary penalties should be levied against Qwest.

87. Further, Qwest should attest annually to the lack of any agreements which limit CLEC participation in Arizona proceedings or in any other way interfere with normal Arizona regulatory proceedings. Failure to timely provide such attestation should be considered de facto admission of the existence of such agreements, and automatically cause a penalty to be invoked.

88. In addition, for two years after Section 271 relief is granted, the Arizona Commission should periodically (annually) audit[16] the implementation of each of these measures.

89. The performance of a third party independent audit on the part of the Arizona Commission on an annual basis, covering each of the commitments cited above, should preclude future transgressions, such as those discussed herein.

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[14] Qwest Corporation's January 20, 2003 response to AT&T and RUCO's January 10, 2003 comments in the Section 271 Sub-Docket, page 6

[15] Independent Auditor funding is to be provided by Qwest; section of the auditor should be approved by the ACC.

[16] Staff believes this work should be done by the Independent Auditor at the direction of the ACC.

90. Staff believes that the Commission, under A.R.S. Section 40-424, can levy fines of up to $5,000 per calendar day, per occurrence. [17] Given that there were 4 agreements between Qwest, Eschelon, McLeod, Z-Tel and XO for the number of days shown on Table A below, Staff believes that the Commission has the authority to fine Qwest as much as 7.415 million for its interference with the Arizona regulatory process.

91. Due to the egregious nature of Qwest's conduct and the fact that its conduct compromised the integrity of the Commission's 271 proceeding, Staff is recommending that the Commission impose the maximum fines allowed under A.R.S. Section 40-424.

TABLE A

No.	**Date Of Agreement**	**Description of Agreement Containing Nonparticipation Clause**	**Date Agreement Cancelled Superceded or filed with the Arizona Corporation Commission**	**Calendar Days Effective**	**Penalty Amount**
1	11/15/00	Eschelon Procedures Letter from Qwest	03/01/02	466	$2,330,000
2	10/01/00 (on or about)	McLeod Oral Agreement with Qwest for volume discount	There were two written agreements, also on 10/26/01. Staff has no information concerning cancellation or superceding for any of the three agreements dated 10/01/00. Use a September 19, 2002 cancellation date for the oral agreement.	708	3,540,000
3	12/31/01	XO (subs) Confidential. Bill Settlement Agreement	09/09/02	249	1,245,000
4	5/18/01	Z-Tel MOU	7/17/01	60	300,000
Total	—	—	—	1,423	$7,415,000

VII. CONCLUSION

92. In conclusion, Staff believes that the record shows that Qwest committed transgressions by implicitly or explicitly causing non-participation of certain CLECs in the Arizona Section 271 process, which interfered with Arizona's regulatory process. Qwest has acknowledged these transgressions, and outlined a program intended to assure that similar transgressions will not recur. The July 30 – 31, 2002 Workshop provided CLECs which had not participated in the Section

[17] A.R.S. 40-424, contempt of corporation commission; penalty: A. If any corporation or person fails to observe or comply with any order, rule, or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission be fined by the commission in an amount not less than one hundred nor more than five thousand dollars, which shall be recovered as penalties. B. The remedy prescribed by this article shall be cumulative.

271 proceeding the opportunity to present all issues which they had not previously presented. Staff, in its reports on this Workshop, proposes resolutions for all of these issues.

93. Staff has considered the evidence and assessed the extent to which Qwest has interfered with the Arizona regulatory process. Staff's recommended penalties should provide Qwest sufficient incentive to assure the Arizona Commission that events of the past will not recur.

94. In summary, Staff recommends that four non-monetary penalties be imposed on Qwest, as follows:

a. Qwest must implement and abide by all assurances contained in its December 23, 2002 filing.

b. Qwest must establish an independent, third party auditor, and have this auditor screen the work of the Agreement Review Committee regularly for two years or until the ACC authorizes termination of the auditor.

c. On an annual basis, Qwest should attest to the fact that it has no agreements that preclude CLEC participation in ACC regulatory proceedings, or that would tend to discourage them from such participation.

d. The ACC should conduct periodic (annual) reviews of each December 23, 2002 filing commitment for two years, or until the ACC is fully assured that transgressions of the past will not recur.

95. Staff also recommends that a penalty of $7.415 million, the maximum allowable under A.R.S. Section 40-424, be assessed against Qwest in the Section 271 proceeding, for its observed interference with the Arizona Section 271 regulatory process.

A

ride the light

Qwest.

Qwest
1801 California Street
Suite 5200
Denver, CO 80202
Telephone: 303-992-2787
Facsimile: 303-992-2789

Greg Casey
Executive Vice President
Wholesale Markets

November 15, 2000

CONFIDENTIAL AGREEMENT

VIA ELECTRONIC MAIL AND FACSIMILE

Richard A. Smith
President and Chief Operating Officer
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, Minnesota 55402

Re: Escalation procedures and business solutions

Dear Rick:

As a result of ongoing discussions between Eschelon and Qwest in recent days, the parties have addressed numerous proposals intended to better the parties' business relationship. In principle, the parties have agreed to: (1) develop an implementation plan by which to mutually improve the companies' business relations and to develop a multi-state interconnection agreement; (2) arrange quarterly meetings between executives of each company to address unresolved and/or anticipated business issues; and (3) establish and follow escalation procedures designed to facilitate and expedite business-to-business dispute solutions.

1. IMPLEMENTATION PLAN

By no later than December 31, 2000, the parties agree to meet together (via telephone, live conference or otherwise), and as necessary thereafter, to develop an Implementation Plan. The purpose of the Implementation Plan ("Plan") will be to establish processes and procedures to mutually improve the companies' business relations and to develop a multi-state interconnection agreement. Both parties agree to participate in good faith and dedicate the necessary time and resources to the development of the Implementation Plan, and to finalize an Implementation Plan by no later than April 30, 2001. Any necessary escalation and arbitration of issues arising during development of the Plan must also be completed by April 30, 2001.

During development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements. Both before and after April 30, 2001, Eschelon reserves the right, after notice to Qwest, to participate in regulatory cost proceedings or dockets regarding the establishment of rates. Notwithstanding any other provision of this agreement, if no Plan is agreed upon by April 30, 2001, the Parties will have all remedies available at law and equity in any forum.

EXHIBIT 14

2. QUARTERLY MEETINGS

Beginning in 2001 and continuing through the end of 2005, the parties agree to attend and participate in quarterly executive meetings, the purpose of which will be to address, discuss and attempt to resolve unresolved business issues and disputes, anticipated business issues, and issues related to the Parties' Interconnection Agreements, Implementation Plan, and other agreements. The meetings will be attended by executives from both companies at the vice-president and/or above level.

3. ESCALATION PROCEDURES

The parties wish to establish a business-to-business relationship and agree that they will resolve any and all business issues that may arise between them, including but not limited to, their Interconnection Agreements and Amendments, in accordance with the escalation procedures set forth herein. The parties agree, subject to any subsequent written agreement between the parties, to: (1) utilize the following escalation process and time frames to resolve such disputes; (2) commit the time, resources and good faith necessary to meaningful dispute resolution; (3) not proceed to a higher level of dispute resolution until either a response is received or expiration of the time frame for the prior level of dispute resolution; (4) grant to one another, at the request of the other party, reasonable extensions of time at Levels 1 and 2 of the dispute resolution process to facilitate a business resolution; and (5) complete Levels 1, 2 and 3 of dispute resolution before seeking resolution through arbitration or the courts.

Level	Participants	Time frame for discussions
LEVEL 1	Vice Presidents (Judy Tinkham/Dave Kunde, Lynne Powers, Bill Markert, or successors)	10 business days
LEVEL 2	Senior Vice Presidents (Greg Casey/Rick Smith, or successors)	10 business days
LEVEL 3	CEOs (Joe Nacchio/Rick Smith, or successors)	10 business days

LEVEL 4 Arbitration according to the provisions of the Parties' Interconnection Agreements and/or other agreements (to be expedited and completed within 90 days, upon request of one of the Parties)

LEVEL 5	CEOs (Joe Nacchio/Rick Smith, or successors)	10 business days

LEVEL 6 If a dispute is not resolved in Levels 1 through 5, either party may initiate litigation in federal or state court, with all questions of fact and law to be submitted for determination to the judge, not a jury. The parties agree that the exclusive venues for civil court actions initiated by Eschelon are the United States District Court for the District of Minnesota or a court of the State of Minnesota and the exclusive venues for civil court actions initiated by Qwest are the United States District Court for the Districts of Minnesota or Colorado or the courts of the State of Minnesota or Colorado. When a court issues a final order, no longer subject to appeal, the prevailing party shall be awarded reasonable attorneys' fees and expenses. In the event that either party files an action in court, the parties waive: (a) primary jurisdiction in any state utility or service commission; and (b) any tariff limitations on damages or other limitation on actual damages, to the extent that such damages are reasonably foreseeable and acknowledging each party's duty to mitigate damages.

If the parties agree with the terms set forth above, they will each execute a copy of this letter in the signature spaces provided on the last page. Upon signature of both parties, the parties will be bound by the terms set forth herein. This letter agreement may be executed in counterparts and by facsimile.

Very truly yours,

Greg Casey
Executive Vice President
Wholesale Markets

TERMS OF LETTER AGREEMENT ACCEPTED BY:

QWEST CORPORATION

[name]

EVP

[title]

11-15-00

[date]

Approved as to legal form

NOV 15 2000

ESCHELON TELECOM, INC.

[name]

[title]

[date]

TERMS OF LETTER AGREEMENT ACCEPTED BY:

QWEST CORPORATION

____
[name]

____
[title]

____
[date]

ESCHELON TELECOM, INC.

____
[name]

President - COO
[title]

11/15/00
[date]

B

Legal

eschelon telecom, inc.

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AZ CORP COMMISSION
DOCUMENT CONTROL

Maureen
Caroline
Phil

June 24, 2002

By facsimile & U.S. mail

RECEIVED
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LEGAL DIV.
ARIZ. CORPORATION COMMISSION

Commissioner Marc Spitzer
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007-2996

Re: Qwest's June 18, 2002 Letter to Commissioner Marc Spitzer; AZ Docket Nos. RT-00000F-02-0271, T-00000A-97-0238

Dear Commissioner Spitzer:

Eschelon Telecom, Inc. ("Eschelon") received a copy of your letter to the Parties in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. We also received a copy of the June 18, 2002 response to your letter by Qwest Corporation ("Qwest's Letter"). Although Qwest entered into unfiled agreements with several Competitive Local Exchange Carriers ("CLECs"),[1] Qwest discusses the Eschelon agreements specifically in its letter, indicating that it is using these agreements as an illustration. While Eschelon could agree to some of the statements in Qwest's Letter, Eschelon has a different perspective as to the events. Eschelon believes that, now that Qwest has submitted its letter, Eschelon should state its position for the Commission.

Qwest's conduct with respect to Eschelon, McLeod, Covad, or the other small CLECs with which Qwest had agreements needs to be reviewed in context. In the fall of 2000, Qwest's then Chairman and Chief Executive Officer, Joseph Nacchio, publicly announced an agreement with McLeod, which he characterized as a significant positive development. He stood before the Regional Oversight Committee ("ROC") and told members that Qwest was going to go behind closed doors and work out differences with CLECs, rather than litigate them. Representatives of Qwest repeatedly said they wanted to work on a "business-to-business" basis with Eschelon, rather than litigate issues. They also continually attempted to distinguish Qwest from the former company, US West.[2]

[1]*See* Staff Report and Recommendation, *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, AZ Docket No. RT-00000F-02-0271 (June 2, 2002); *see also* Amended Verified Complaint, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197 (March 19, 2002). The "small CLECs" identified in the Minnesota Complaint include the following 10 CLECs: HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, Onvoy Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, VAL-ED Joint Venture, and WETEC. *See id.* ¶ 196.

[2]*See also* "After Joseph P. Nacchio, Qwest Communications International Inc.'s brash, Brooklyn-born chief executive, won the battle for U S West in 1999, he wasted no time deriding the sleepy regional Bell.

Qwest asked for time to make the transition to become a more CLEC-friendly wholesale business. Qwest made these types of statements to others as well.[3] As the Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") shows, Eschelon's management wanted to believe in the promise of a better relationship under new management and attempted to use the non-litigious path touted by Qwest.[4]

Some members of Eschelon's management have worked for incumbent local exchange carriers ("ILECs") themselves. They have also been through changes in ownership and management and know that the related transitions can take time. Eschelon's management was open to working with Qwest and, if it really worked, to saying so publicly and perhaps even at some point supporting Qwest's 271 bid.[5] Although it could be inferred from Qwest's Letter that it worked, it didn't work.

Despite the suggestion in Qwest's Letter to the contrary, the 271 provision in the Escalation Letter was a condition of obtaining and implementing a plan to improve service quality, not a provision following successful implementation of a plan. Qwest would not agree to develop a plan to address pressing service quality and other problems unless Eschelon dropped its opposition to Qwest's 271 bid. Whereas Qwest's Letter reads as though all service problems were solved ***before*** Eschelon dropped out of the 271 proceedings, Qwest required Eschelon to ***first*** drop out of the proceedings. Eschelon thus takes issue with the following statement in Qwest's Letter: "Eschelon's agreement to not oppose Qwest's Section 271 application was . . . expressly contingent upon the parties' ability to agree upon *and implement* a plan that satisfied Eschelon." Qwest's Letter, p. 2 (emphasis in original). The Escalation Letter included only an ***agreement to agree*** to a plan to implement service quality solutions. It did ***not*** condition Eschelon's agreement to not oppose Qwest's Section 271 application upon the parties' ability to ***implement*** a plan,

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In senior management meetings, he described the company as 'U S Worst' and publicly likened the company's workers to 'clowns.' He surrounded himself with colleagues from his high-flying upstart, and cut U S West executives out of the loop. When Qwest moved into U S West's dated-looking headquarters here, Mr. Nacchio installed a sign on the 52nd floor that read: 'Excuse our appearance. We're entrepreneurs. This building was built in a different era and we save cash by not remodeling.'" Solomon, Deborah, "Bad Connection: How Qwest's Merger With a Baby Bell Left Both in Trouble --- Brash Mr. Nacchio Derided U S West After Buying It; Now, It's His Safety Net --- SEC Probes the Accounting," *The Wall Street Journal* (via Dow Jones), p. A1 (April 2002).

[3] *See, e.g., id.*

[4] Generally, public policy favors settling disputes. *See, e.g.*, Minn. Stat. § 237.011 ("Telecommunications goals"; "encouraging voluntary resolution of issues between and among competing providers and discouraging litigation."). In the 271 dockets, Eschelon refrained from litigation while attempting to resolve disputes, including quality of service problems. Eschelon's conduct was legitimate behavior, particulary because Eschelon was not obligated to participate in the 271 proceedings. It is a separate question as to whether any other rule or policy required Qwest to disclose the known problems raised by Eschelon in discovery, pursuant to the burden of proof, or otherwise in the 271 proceedings.

[5] In fact, when Eschelon experienced improvement in Qwest's performance, Eschelon acknowledged that improvement, even in some cases when the performance still had a ways to go. Eschelon's management hoped that positive reinforcement would encourage progress, and Qwest made it known that it was more willing to negotiate if CLECs made such statements.

as represented in Qwest's Letter. Although Qwest's Letter cites the April 30, 2001, deadline for agreeing to an implementation plan, that deadline was extended more than once. An implementation plan was not agreed upon until July of 2001. The July agreements had to be implemented after that date. From November 15, 2000 through July of 2001 (and afterward), however, Qwest required that Eschelon not participate in 271 proceedings as a condition of continuing negotiations as to the plan and implementation of the plan and later agreements.

Nonetheless, the premise of Qwest's Letter, with respect to Eschelon, appears to be that Eschelon did not participate in 271 proceedings because Eschelon's problems were solved. Qwest's Letter particularly creates this impression for a reader unfamiliar with the underlying facts. But, this is not the case. The problems were not all solved. Qwest points to Eschelon's letter of November 3, 2000, to the Commission to suggest that, if any[6] problems continued to exist, Eschelon would have continued to raise them in the 271 proceeding. As Qwest knows, however, the later November 15, 2000, Escalation Letter required Eschelon's silence.[7] Despite Eschelon's arguments to the contrary, Qwest interpreted that agreement more broadly than not opposing Qwest and said that it required Eschelon not to participate in the 271/SGAT proceedings.[8]

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[6] The November 3, 2000, letter related primarily to cutover issues. Most of the problems raised by Eschelon in the Arizona 271 proceeding related to UNE-P. *See* Eschelon's Comments Addressing UNE Combinations, *In re. U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000) ("Arizona UNE-P Comments"); *see also* Verification of Garth Morrisette (same).

[7] Qwest states that none *of the five merger-related agreements in issue* contained agreements to refrain from participation in 271 proceedings. *See* Qwest's Letter, p. 1. Qwest also states that only two agreements *of those referred to by Commissioner Spitzer* mentioned 271 proceedings. *Id.* If they do not imply that there were no other agreements relating to 271 participation, these statements at least leave the issue unanswered for the Commissioner. According to a news report, McLeod had an agreement not to oppose Qwest in 271 proceedings, but it was an oral agreement. *See* "States Probe Qwest's Secret Deals To Expand Long-Distance Service," *Wall Street Journal*, p. A10 (April 20, 2002) ("As part of that deal, McLeod agreed to stop its opposition to the Qwest-U S West merger. The company also had a verbal agreement to not oppose Qwest's entry into long-distance, McLeod officials told regulators, a contention that Qwest does not dispute.") Qwest does not state whether there were any others.

[8] Qwest particularly objected to Eschelon raising publicly any problems with commercial performance. Eschelon argued that it could participate in SGAT proceedings to gain input into the wording of the SGAT without submitting evidence of problems with commercial performance. Eschelon believed that an opportunity to influence the language of the SGAT would have been important and valuable, because Eschelon has a different business plan from other CLECs involved in that process and could have tried to ensure that its issues were addressed. Qwest also uses the SGAT as a negotiation template, and participation in the SGAT proceedings would have allowed Eschelon to gain a better understanding of that template. But, Qwest took the opposite position and claimed that Eschelon's participation would breach the Escalation Letter. In fact, on the one occasion when Eschelon's representative later attended a multi-state 271/SGAT workshop in Denver, Qwest's attorney Charles Steese told her that she should not be there. Qwest's representatives also called Eschelon's top management to complain and made Eschelon "explain" its conduct. Afterward, Eschelon no longer participated in the 271 proceedings, as required by Qwest.

Because Qwest required confidentiality and did not disclose the Escalation Letter,[9] Qwest was able to create the impression that problems with Qwest's commercial performance were solved when all of them were not. Qwest bears the ultimate burden of proof as to its commercial performance on all checklist items, however, even if "no party files comments challenging compliance with a particular requirement." FCC BANY Order, ¶ 47.[10]

Eschelon entered into the plan and related agreements with the expectation that, if an agreement were reached as to service quality issues, Qwest would abide by the agreement. Although Qwest represents in Qwest's Letter that the 271 provision was . . . contingent upon the parties' ability to agree upon and implement a plan "***that satisfied Eschelon***,"[11] Qwest still has not implemented a plan to address Eschelon's quality issues to Eschelon's satisfaction. *See, e.g.,* Affidavit of Lynne Powers (June 7, 2002) (copy enclosed).[12] Eschelon had many service problems, access and billing problems, and other issues with Qwest's commercial performance throughout the course of the Arizona 271 proceeding. Qwest was aware of these problems, through many discussions with Eschelon, as well as through monthly Report Cards provided by Eschelon to Qwest during that time. Eschelon could not raise these issues to the ACC, however, because Qwest continued to hold Eschelon to the requirement that Eschelon not oppose Qwest in 271 proceedings.[13] Therefore, the following statement in Qwest's Letter is also inaccurate: "if it did not [work], Eschelon was free to say so, to the ACC or to anyone else." Although Eschelon was dissatisfied in several respects, pursuant to the November

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[9] Regarding Qwest's obligation to file agreements, Eschelon agrees with the following quotation by Anthony Mendoza, the Minnesota Department of Commerce deputy commissioner for telecommunications: "'[Qwest] is the only company that is required to disclose them to the PUC.'" *See* "Companies didn't clear deals with PUC, regulators say," Steve Alexander, Minneapolis *Star Tribune*, Feb 15, 2002, p. D2. The federal Act places the burden on Qwest to make terms of interconnection, if any, available to other CLECs, and therefore it is Qwest's responsibility to make that determination and file any such agreements pursuant to the Act. Placement of the burden on Qwest makes sense, because Qwest has superior access to information relevant to whether a term or condition is of the type for which filing is required. (For example, while a CLEC may believe that a term is in settlement of an individual dispute, Qwest is in a position to know whether the dispute is truly unique or the experience is shared by other CLECs and whether the same or similar solution is suitable for, and should be made available to, other CLECs.) Eschelon is not aware of anything in the agreements that prevented Qwest from filing them. Qwest could have requested written consent for disclosure from CLECs at any time, if Qwest claims it was concerned about the confidentiality provisions that Qwest required as part of agreements.

[10] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. December 22, 1999) ["FCC BANY Order"].

[11] *See* Qwest's Letter, p. 2 (emphasis added).

[12] Not only were Eschelon's substantive issues not fully addressed, but also Qwest did not even adhere to the terms of the Escalation Letter itself. The letter identified Qwest's then CEO Mr. Nacchio by name and required Mr. Nacchio to meet with Eschelon, but Mr. Nacchio refused to do so.

[13] For example, the enclosed email, dated May 25, 2001, from Eschelon to Andrew Crain, Charles Steese, and Jim Gallegos of Qwest confirms that Eschelon was not responding to Qwest discovery in the Arizona 271 proceeding, because Eschelon was "not participating in the [Arizona 271] proceeding at Qwest's request."

15, 2000, Escalation Letter, Eschelon was not "free to say so, to the ACC or to anyone else."

In Qwest's Letter, Qwest also points out that Eschelon participated in the Change Management Process ("CMP") (including Re-design) while the 271 proceeding was pending. The CMP is separate from the 271 proceedings, and issues raised in monthly CMP meetings were not necessarily brought to the 271 proceedings. Any issues that were did not have the benefit of explanation by Eschelon, which had first-hand experience with the problems. Eschelon would have participated more fully in CMP, if Qwest had not exerted pressure on Eschelon not to do so. Eschelon argued that CMP was not a 271 proceeding and therefore the Escalation Letter did not prohibit participation in CMP.[14] Qwest took the opposite position and actively enforced it. Qwest had Eschelon representatives pulled from CMP Re-Design meetings, reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report, required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs, and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming known. Finally, Eschelon's President personally attended CMP monthly and Re-Design meetings to determine whether Qwest's attacks on Eschelon representatives were fair and whether Qwest's representations that CMP issues could be resolved just as well outside of CMP were accurate. Eschelon's President concluded that Qwest's statements were not fair or accurate and the Eschelon's CMP participation was appropriate and necessary to resolve critical business issues. Eschelon's President encouraged Gordon Martin of Qwest to also attend the CMP meetings to gain an understanding of that process and Eschelon's perspective. Mr. Martin did not do so. Although Eschelon ultimately maintained some level of participation in CMP, it is difficult and frustrating, in light of the actual events, to read that Qwest is now holding out Eschelon's participation in CMP as evidence of alleged full and uninhibited participation in CMP.

Qwest also states in its letter that: "The purpose of the settlements was not to suppress complaints but rather to *resolve* them." Qwest's Letter, p. 1 (emphasis in original). However, in addition to Qwest's position with respect to CMP and 271/SGAT meetings, on October 30, 2001, Qwest provided two written proposals to Eschelon. In those proposals, Qwest said it would require Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process" relating to missing switched access minutes to Qwest. Qwest also conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." Eschelon refused to sign these proposals. The issues between Eschelon and Qwest could easily have been resolved

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[14] In this general time frame, Qwest stopped making payments to Eschelon, despite written contractual obligations to pay Eschelon. When doing so, Qwest was well aware of market conditions and the resulting additional pressure that would be placed on Eschelon from stopping the payments and knew that doing so gave Qwest greater leverage over Eschelon. Eschelon does not know whether any CLEC that did stop its participation in CMP, if any, continued receiving payments whereas the payments to Eschelon stopped.

without these provisions, which did nothing to address problems experienced by Eschelon. But, Qwest included those terms as an integral part of its proposals. Because Qwest has made representations regarding its purpose in proposing settlements, the Commission should have these facts when making that determination.

The telecommunications market is experiencing critical challenges. As a start-up, smaller company, Eschelon is particularly affected by these challenges. Resources are tight, and Eschelon's energy needs to be devoted to meeting the business challenges that it faces daily. Eschelon is also aware that it has settled some of its own claims with Qwest and that it may be viewed as late in speaking out. In light of all of this, Eschelon hesitated to send this letter. Because of Qwest's specific discussion of its dealings with Eschelon in Qwest's Letter, however, Eschelon decided it should share its different perspective.

Sincerely,

J. Jeffery Oxley
Vice President, General Counsel, and Corporate Secretary

cc: Chairman William A. Mundell
Commissioner Jim Irvin
Timothy Berg, Qwest
Todd L. Lundy, Qwest
Richard Corbetta, Qwest
Docket Control (original plus 20 copies)
Service Lists (all parties of record in both dockets)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF MINNESOTA

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis Reha	Commissioner

In the Matter of a Commission Investigation Into Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 that the Requested Authorization is Consistent with the Public Interest, Convenience and Necessity

PUC Docket No. P421/CI-01-1373
OAH Docket No. 6-2500-14488-2

AFFIDAVIT OF
F. LYNNE POWERS

I, F. Lynne Powers, being duly sworn, state:

1. I am the Executive Vice President of Customer Operations for Eschelon Telecom, Inc. ("Eschelon"). My areas of responsibility include provisioning, repair, and customer care.

<u>UNE-Platform</u>

2. In approximately mid-May of 2000, Eschelon began efforts to prepare to order from Qwest UNE-Platform ("UNE-P") lines. UNE-P is a combination of the following unbundled network elements ("UNEs"): loop, switching, and transport. At that time, Qwest did not provide information about feature availability with UNE-P on its web-site. Feature information is critical to developing and marketing a product. It took more than four months for Eschelon to extract that information from Qwest. When Eschelon finally obtained a list of available features, the list was incomplete and unclear.

3. In the absence of receiving a definitive list of available features for UNE-P from Qwest and in the process of compiling its own list of Universal Service Ordering Codes ("USOCs") for ordering, Eschelon attempted to test availability of various features and USOCs by placing trial orders (using employee lines) in Minnesota. Eschelon wanted to submit trial orders in additional states as well. But, at that time, Qwest would not accept orders for UNE combinations anywhere in its territory, except Minnesota, without a contract amendment. Qwest took this position even though Eschelon has an interconnection agreement with Qwest in every one of the states in which it operates[1] that

[1]Eschelon does business within Qwest territory in Arizona, Colorado, Minnesota, Oregon, Utah, and Washington. Other than the information relating to the Minnesota UNE-P trial orders (and certain repair information discussed below), the information in this Affidavit (including that relating to UNE-E/UNE-Star) applies in each of these states.

requires Qwest to provide UNEs "in combination" in accordance with the Act, FCC rules, and state law.[2] In those states, Eschelon has opted in to interconnection agreements of AT&T Communications, Inc. ("AT&T"). Therefore, Eschelon, AT&T, and other opt-in Competitive Local Exchange Carriers ("CLECs") should have been able to order UNE combinations pursuant to the terms of their existing interconnection agreements with Qwest. But, for many months, the only state in Qwest's territory where Qwest would process orders for UNE combinations without a contract amendment was Minnesota. Although Qwest had previously required a contract amendment in Minnesota as well, Qwest changed its position after the Minnesota Public Utilities Commission issued a decision requiring Qwest to provide UNE Combinations.[3]

4. In Minnesota, where Qwest allowed Eschelon to submit UNE-P orders, the UNE-P trial orders resulted in denial and loss of features, including Qwest deletion of features without notice to Eschelon; unclear and changing processes; and customer-affecting service problems. Minnesota UNE-P trial order customers experienced:

- complete outages, with no dial tone, for a day or more
- inability to call out locally
- inability to place long distance calls
- loss of features
- inability to forward calls between central offices

5. The problems were too numerous to launch a product offering using UNE-P at that time, because doing so would not only have caused Eschelon to incur unnecessary expenses and delays but also exposed Eschelon's end-user customers to these problems. Eschelon also could not afford to leave its Off-Net[4] customer base on resale, which was prohibitively expensive. UNE combinations not only have lower prices than resale, but also they allow CLECs to collect switched access payments that, with resale, go to the incumbent. Although Eschelon had a contractual right to the lower

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[2] *See* Eschelon-Qwest Interconnection Agreements: AZ, Part A, ¶ 21 & Att. 3, ¶¶ 3.3 & 18.1; CO Part A, ¶ 8.1 & Att. 3, ¶¶ 2.4 & 15.1; MN, Part A, ¶ 20 & Att. 3, ¶ 14.1; OR, Part A, ¶¶ 19 & 36 & Att. 3, ¶ 14.1; UT, Part A, ¶ 21 & Att. 3, ¶¶ 3.3 & 18.1; WA, Part A, ¶ 21.1 & Att. 3, ¶¶ 1.2.2 & 18.1; *see, e.g.*, Agreement for Local Wireline Network Interconnection and Service Resale Between Advanced Telecommunications, Inc. and U S WEST Communications, Inc., for the State of Arizona, Agreement No. CDS-000106-0212; Decision No. 62489 (Jan. 20, 2000) ("Agreement"). The Arizona Agreement, for example, deals specifically with issues such as the definition of "Combinations," *see id.* Part A, p. 4; cooperative testing of combinations, *see id.* ¶ Att 3, Para 18.1; service order process requirements for combinations, *see id.* Att. 5, ¶ 2.2.2.1, and other issues.

[3] *See* Order After Remand, *In re. the Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc. and AT&T*, MCI, MFS, and AT&T Wireless, Docket No. P-421/CI-99-786 (March 14, 2000) ("MN Order After Remand").

[4] Eschelon has its own switches for providing voice service. When using its switches to serve its customers, Eschelon orders collocation, loops, *etc.*, from Qwest. In some cases (particularly when a customer is outside of the area served by Eschelon's switch), Eschelon also orders UNE-E, UNE-P, or resale from Qwest to serve customers. Eschelon often refers to customers and lines served through Eschelon's own switching facilities as "On-Net" or "On-Switch" and customers and lines served through UNE-E, UNE-P, or resale as "Off-Net."

prices and the access payments, it found that the UNE-P combination was not, as a practical matter, available from Qwest at an acceptable level of quality.

UNE-Eschelon

6. Eschelon raised these concerns with Qwest.[5] On November 15, 2000, Eschelon and Qwest executed an interconnection agreement amendment pursuant to which Eschelon could order another UNE combination, or "Platform," which was also a combination of loop, switching, and transport. *See* Exhibit 1. Qwest initially referred to this product as UNE-Eschelon ("UNE-E"). Qwest presented UNE-E as being like UNE-P, except generally for pricing that includes a flat rate up to a certain number of minutes;[6] the ability to order Qwest voice messaging and Digital Subscriber Line ("DSL")[7] (at retail rates); and inclusion of Eschelon's existing resale base customers in the Platform product.[8] Qwest said that, with UNE-E, Eschelon would be able to collect the switched access revenues that are unavailable with resale. Although switched access is also available with UNE-P, the problems described above with UNE-P remained unsolved. Instead of addressing those problems at that time, Qwest promised Eschelon that it would move Eschelon's base of resale customers to UNE-E. To avoid the provisioning problems associated with submitting separate Local Service Requests ("LSRs") for each line being converted from resale to a UNE combination -- such as the problems Eschelon had experienced when attempting to order UNE-P -- Qwest said that it would develop a tool to do the work on its side. With this tool, Qwest would convert Eschelon's resale base to UNE-E, without the need for individual LSRs from Eschelon and without adverse customer impact.

7. Qwest said that it would not be able to complete the conversion of Eschelon's resale base to UNE-E for a few months. Therefore, in the short-term, Qwest told Eschelon to order UNE-E through the existing resale process. *See, e.g.*, Exhibit 2 (email from Judy Rixe, Qwest's then Account Manager for Eschelon). Qwest said that it would continue to bill Eschelon at the resale rates through the existing resale billing process. *See id.* Qwest said that Qwest Finance would then compare the end-of-month billed revenues to the UNE-E rates and pay Eschelon the difference. *See id.* After the

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[5] In addition, Eschelon described these problems in 55-page comments filed with the Arizona Corporation Commission on September 21, 2000. *See* Eschelon's Comments Addressing UNE Combinations, *In re. U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000) ("Arizona UNE-P Comments"); *see also* Verification of Garth Morrisette (same).

[6] *See* Exhibit 1 (UNE-E Amendment, Att. 3.2, pp. 9-10). Although UNE-E was supposed to be distinguishable from UNE-P because it is flat-rated, Eschelon later learned that UNE-P-Centrex is also flat-rated. *See* http://www.qwest.com/wholesale/pcat/unepcentrex.html ("Until Qwest systems are able to record and bill actual usage information, Shared Transport Originating MOU and Local Switching Originating MOU will be billed at a flat monthly rate based on assumed MOU."). *See* excerpt attached as Exhibit 3.

[7] Although Qwest now offers Qwest DSL with UNE-P lines (*see* Exhibit 8), at that time Qwest's position was that a CLEC could not order DSL with UNE-P lines.

[8] In the agreement, Qwest did not place limits on the conversion of Eschelon's resale base to the new "Platform." *See* Exhibit 1. Later, Qwest began imposing limitations, such as excluding certain features and lines from the conversion.

first few months, however, the ordering and billing processes were supposed to change to allow Eschelon to order UNE-E (not resale) and receive accurate UNE-E bills. *See, e.g.*, *id.* ("Develop billing process for flat-rated UNE-Deal"). Although Qwest later pushed out its target dates for the promised changes, Qwest continued to represent that it was proceeding with changes to allow accurate UNE-E ordering and billing. *See, e.g.*, Exhibit 4 (email and memorandum from Freddi Pennington of Qwest).

UNE-Star

8. Shortly after agreeing to provide UNE-E to Eschelon, Qwest began to refer to UNE-E as "UNE-Star." *See, e.g.*, Exhibit 2 (subject line of "UNE-Star Implementation").[9] Qwest said that it had formed an internal team of more than 35 Qwest representatives to implement the "new product." *See, e.g., id.* Qwest referred to these representatives as its "UNE-STAR Implementation team." *See, e.g.*, Exhibit 4. In many meetings, Qwest referred to UNE-Star as a Qwest "product." Sometimes, Qwest applies a one-size-fits-all approach to "products" that does not account for contractual differences. Eschelon agreed to the UNE-E interconnection agreement amendment, *see* Exhibit 1, based on Qwest's representations that UNE-E would have certain characteristics (such as feature availability and avoiding adverse customer impact). Eschelon expressed concern that it needed visibility into, and participation in, the UNE-Star product implementation to ensure that the product was implemented consistent with the promises made to Eschelon. Eschelon also believed that it could provide a valuable service to Qwest by providing CLEC input that would improve the product. But, Qwest did not allow Eschelon to meet with Qwest's UNE-STAR Implementation team. Instead, Eschelon had to press Qwest service and product managers, as well as Information Technologies ("IT") personnel, to provide information and updates to Eschelon about UNE-Star. *See, e.g.*, Exhibits 4 & 5. Qwest said that UNE-E and the UNE-Star product were the same. *See, e.g.*, Exhibit 5.

9. The process experienced many delays. *See, e.g.*, Exhibits 4 & 5. In the meantime, Eschelon had to devote resources to dealing with the UNE-E/UNE-Star problems that Qwest had agreed to solve. Now, I understand that Qwest has testified in the cost case that "we don't have a product anywhere called UNE-Star" and that "you're never going to see any offering for like a UNE-Star if that's the name of an agreement. It's not the name of one of our products."[10] These statements cause me to ask whether

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[9]Qwest refers to the same product as "UNE Eschelon" ("UNE-E") when provided to Eschelon; as "UNE-McLeod" ("UNE-M") when provided to McLeodUSA; and otherwise as "UNE-Star." *See* Qwest Corporation's Verified Answer to the Complaint of the Minnesota Department of Commerce, *In re. Complaint of the Minnesota Department of Commerce Against Qwest Corporation*, Docket No. P-421/C-02-197, ¶ 7, p. 12 (March 1, 2002) ["Qwest Verified Answer"] (excerpt attached as Exhibit 6).

[10] Cross-Examination of Kathryn Malone, Transcript Vol. 7, page 104, lines 23-24 & page 105, lines 5-7 (May 21, 2001), In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element (UNE) Prices, PUC Docket No. P-421/CI-01-1375. *See* excerpt attached as Exhibit 7. Ms. Malone testified that she is "Manager – Wholesale Markets" and that she is "responsible for Wholesale advocacy surrounding interconnection and resale of products and services" at Qwest. *See* Direct Testimony of Kathryn Malone, p. 2, lines 4-6 (March 18, 2002; same docket); excerpt attached as part of Exhibit 7. According to Ms. Rixe, "Wholesale Advocacy" and "Wholesale Marketing" were represented on the Qwest internal UNE-Star implementation team. *See* Exhibit 2.

Qwest ever intended to deliver on its promises to implement UNE-E/UNE-Star long-term product improvements, or whether Qwest was simply delaying Eschelon and causing Eschelon to expend resources on a claimed product that Qwest did not intend to deliver as promised.

10. As discussed, one of the advantages of the November 15, 2000, interconnection agreement amendment was supposed to be that Qwest would convert Eschelon's base from resale to UNE-E/UNE-Star without the necessity of Eschelon placing individual LSRs to convert each customer. Qwest never completed the physical conversion to UNE-E/UNE-Star, however, and the UNE-E/UNE-Star product suffers from its own problems. Now, a year and a half later, Eschelon has had to begin, at this late date, the process of placing individual LSRs to convert customers to UNE-P, due to billing, provisioning, and pricing issues with UNE-E/UNE-Star.[11] Although Eschelon has been entitled under its interconnection agreement to UNE-P pricing since before 2000, Eschelon will not receive the benefits of UNE-P pricing until the lines are converted. I estimate that it will take a minimum of seven months and eighteen full-time employees, as well as additional resources, to complete the conversion from UNE-E/UNE-Star to UNE-P. I have already hired 18 people for this purpose. Because we are moving a large number of lines to UNE-P, Eschelon must hope that Qwest has been forced to make sufficient improvements in the UNE-P product to allow the transition and the product to work much more smoothly than Qwest's attempt to provision UNE-P in 2000.

11. Although Eschelon has commenced a conversion of many of its lines to UNE-P, the vast majority of Eschelon's Off-Net lines are still priced according to the UNE-E/UNE-Star product. UNE-E/UNE-Star suffers from billing, provisioning, documentation, switched access, reporting, and repair problems.

Billing

12. Eschelon still receives resale bills for UNE-E/UNE-Star lines, instead of accurate UNE-E/UNE-Star bills. The UNE-E price must be determined to reconcile the resale bills to the UNE-E/UNE-Star price. This was supposed to be an interim process. Qwest said that Eschelon would continue to receive a resale bill until Qwest implemented a process for UNE-E/UNE-Star billing. *See*, *e.g.*, Exhibit 2. Initially, Qwest estimated that this process would be in place by the first quarter of 2001. But, the process was

[11] On March 1, 2002, Eschelon and Qwest entered into a Settlement Agreement. (Paragraph 6 of the Settlement Agreement provides that the Settlement Agreement will be filed with the state commissions in states where Eschelon is certified and has an interconnection agreement. Qwest is to take care of the filing.) Paragraph 3(f) provides that Qwest and Eschelon will form a team for the purpose of developing a plan "to convert UNE-E/UNE-Star lines to UNE-P." Eschelon has started to order UNE-P, and the conversion commenced in April and May of 2002. The conversion has not yet been completed. The lines that were expected to convert as a records only change were converted first. Those lines were on common blocks (so Eschelon had to issue only one order for the conversion of a number of lines). The more time-consuming conversions are other 1FB and Centrex business lines to UNE-P. It is early in the conversion process. Some customer-affecting problems have occurred during the migration of these lines. Although the number does not appear to be great at this early stage, each customer-affecting problem is a serious issue for us. Eschelon is continuing to monitor this issue to determine the cause and extent of any problems.

delayed. *See, e.g.*, Exhibit 4. The process is still not in place, and Eschelon continues to receive resale bills for UNE-E/UNE-Star lines today.

Provisioning

13. Qwest has provisioned the UNE-E/UNE-Star product using a manual process with a known 50% - 70% error rate. From August through October of 2001, Eschelon reviewed service order completion notices to identify order errors and identified an error rate of approximately 50%. Qwest rejected orders in error or removed features without Eschelon's knowledge, and Qwest's translations personnel were unfamiliar with the proper process for translating the UNE-E/Star product in the switch. Many of the errors resulted in adverse end-user customer impact (including repair issues, because the customers did not always experience the impact of the error until some time after the order activity). Eschelon objected to the adverse customer impact and the amount of resources that Eschelon had to expend on dealing with these errors. Eschelon was forced to escalate virtually every problem. In November of 2001, Qwest finally instituted a resource-intensive manual review of the UNE-E/UNE-Star service orders. I attended a meeting during which Toni Dubuque and Chris Siewart of Qwest told Eschelon that Qwest's error rate for UNE-E/UNE-Star service orders was approximately 70%. Qwest has not reported an error rate to Eschelon since then. Although the error rate is high, Qwest's internal review has substantially reduced the number of errors that adversely impact end-user customers. Some customer-affecting problems still occur, however.[12]

14. Eschelon was experiencing even more provisioning problems when first using UNE-E/UNE-Star. UNE-E/UNE-Star essentially provides Centrex functionality on a POTS product. Initially, Qwest required Eschelon to order the needed Centrex-line features on a 1FB. Significant problems arose when a customer was moving to UNE-E/UNE-Star from a Qwest 1FB, often because the features did not interact properly. Qwest told Eschelon that these problems would be addressed by ordering the 1FBs with Custom Calling Management System (CCMS). On July 31, 2001, Qwest and Eschelon entered into two amendments to the interconnection agreement (relating separately to recurring and non-recurring charges) to modify the product to allow ordering of 1FBs with CCMS. *See* Exhibit 1. These amendments were supposed to alleviate the provisioning problems without requiring a change in platform, for which Qwest charges higher rates. The majority of Eschelon's UNE-E/UNE-Star lines require use of 1FB with CCMS. After signing the Amendments, Qwest operational personnel informed Eschelon that CCMS is an old product that the product manager actually wanted to retire and that few people at Qwest are knowledgeable about it. This is consistent with the problems that Eschelon has experienced. Both the service order and the translations personnel at Qwest appear untrained to provide the UNE-E/UNE-Star product. Provisioning the product is requiring additional resources and manual effort by both Qwest and Eschelon. Qwest has indicated that UNE-E/UNE-Star orders will never flow through.

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[12] Although Eschelon is converting lines to UNE-P, many lines will be on UNE-E for months as that process continues, and some lines will remain on UNE-E after the conversion (such as lines that Qwest deems "ineligible" for UNE-P, such as lines with Qwest voice mail).

Documentation

15. Other than some job aids, Qwest has provided little documentation to describe and support the UNE-E/UNE-Star product. UNE-E, or UNE Star, is not identified as one of the available "UNE-P products" in the UNE-P Product Description in Qwest's Product Catalog on Qwest's wholesale website. (*See* http://www.qwest.com/wholesale/pcat/unep.html, p. 1, attached as Exhibit 8.) Because Qwest did not clarify the distinctions between the products in its materials, Qwest's UNE-P announcements have caused confusion. Eschelon representatives, including myself, have had to ask Qwest whether UNE-P announcements (such as Qwest notices regarding systems changes) also apply to UNE-E/UNE-Star and, if so, how they apply. *See, e.g.*, Exhibit 5. As discussed, this was supposed to be a short-term problem, but Qwest has not delivered on all of its promises to implement the UNE-E/UNE-Star product. Some references to UNE-Star can now be found in the systems release notes on Qwest's wholesale web page, but product notifications and training were not developed as indicated (*see, e.g.*, Exhibit 5).

Switched Access

16. Over a period of time, Eschelon complained to Qwest that Qwest was not providing complete and accurate records from which Eschelon could bill interexchange carriers access charges for UNE-E/UNE-Star customers.[13] As an example, if a Qwest retail customer who has selected Qwest as the intraLATA toll PIC calls an Eschelon UNE-E/UNE-Star local customer, Qwest should provide a record of that intraLATA toll call to Eschelon, so that Eschelon can bill Qwest for terminating access. Eschelon needs an accurate report of switched access minutes of use ("MOU"), so that Eschelon may properly bill interexchange carriers for access. Qwest disputed Eschelon's claims as to the vast majority of the missing minutes. Recently, after Eschelon's agreement not to oppose Qwest in 271 proceedings or bring complaints terminated and Eschelon was allowed to raise this issue publicly, the number of minutes reported to Eschelon jumped significantly and became closer to the number of minutes that Eschelon has maintained it should have been receiving all along.[14] The increase in number of minutes occurred very recently, and Eschelon does not know yet whether all of these minutes will be billable or whether this increase in the number of minutes will continue.

Reporting

17. Although the conversion from UNE-E (with resale billing) to UNE-P has only recently commenced, Qwest is already reporting Eschelon's UNE-E/UNE-Star lines as UNE-P lines for purposes of the Regional Oversight Committee (ROC) Performance Indicator Definition (PID) data. Previously, Qwest reported these lines as business lines, which is how the lines appear on the bill received by Eschelon. In reviewing the PID

[13] This is true for On-Net customers as well.

[14] Although Qwest may claim that this is due to a change from use of an interim process to use of Daily Usage Files ("DUF"), Eschelon previously attempted to move off the interim process. Qwest asked Eschelon to return to the interim process, because the long-term process was not working at that time.

data recently, Eschelon found that Qwest's reporting of the lines changed from business lines to UNE-P lines in approximately November of 2001. *See* Exhibit 9.[15] At that time, Qwest changed its reporting not only on a going forward basis, but also retroactively to January of 2001 so that months previously reported as business lines were then reported as UNE-P lines. *See id.* Eschelon was not notified in advance of this change.

18. Qwest is reporting a nearly perfect billing accuracy rate in the PID data. One hundred percent of the UNE-E/UNE-Star rates billed to Eschelon from Qwest for UNE-E/UNE-Star lines, however, are inaccurate, as discussed. If Qwest is able to report a nearly perfect billing rate under these circumstances, a legitimate question exists as to whether the measure accurately reflects the CLEC experience. Additionally, it is unclear whether the PID measures capture the UNE-E/UNE-Star problems that result from service order writing issues. Qwest is manually handling the UNE-E/UNE-Star orders, which means that a Qwest service order writer re-types the order after Eschelon has typed and submitted it. Orders submitted by Eschelon are often not typed correctly by Qwest's order writer. As a result, problems occur, such as features not being provisioned properly. When this happens, an Eschelon customer will report a trouble, because the feature is not working properly. Qwest will close the trouble ticket and indicate "No Trouble Found," because Qwest takes the position that the problem is a service order issue, even though Eschelon's initial order was submitted correctly. Therefore, the trouble does not appear to be captured in the PID data.

<u>Repair (DSL)</u>

19. On November 15, 2000, Qwest agreed to provide Qwest DSL (at retail rates) with UNE-E/UNE-Star. *See* Exhibit 1, Att. 3.2, ¶ III(D).[16] Although Qwest allows Eschelon to order DSL with UNE-E/UNE-Star, Qwest is not prepared to deal with DSL repair issues. Qwest has said that it does not have back end system records containing the DSL technical information needed for repair for Centron/Centrex Plus lines with DSL. On June 5, 2002, Qwest Process Specialist Susie Wells confirmed this to Bonnie Johnson and Tina Schiller of Eschelon, who are both in my organization. Ms. Wells said that, when the service order is processed, the critical technical DSL information needed for repair drops off and does not populate in the Qwest back end systems. She said this information is lost and cannot be retrieved. Ms. Wells said that this problem occurs in Qwest's Eastern and Central billing regions. Those regions include Arizona, Colorado, Minnesota, and Utah, of Eschelon's states. This issue is of particular concern to

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[15] Although separate categories are used for other products (such as UNE-P-POTS), separate categories were not created for UNE-E products (such as UNE-E-POTS). *See* Exhibit 9. If Qwest is claiming that it included UNE-E lines with UNE-P lines because there was not a separate category, Qwest could have simply created another category, as it did with UNE-P-POTS.

[16] Since then, Qwest has also made Qwest DSL available with UNE-P, including UNE-P-Centrex (and Centron). *See, e.g.*, http://www.qwest.com/wholesale/pcat/unepcentrex.html ("You may convert existing Qwest Digitial Subscriber Line (DSL) to UNE-P Centrex with Qwest DSL service. You may also request the installation of new Qwest DSL service on an eligible and existing UNE-P Centrex, subject to loop qualification and availability.") (excerpt attached as part of Exhibit 8). Qwest (Susie Wells) has indicated that the DSL repair problem applies to both UNE-E and UNE-P.

Eschelon in Minnesota and Colorado, because of Eschelon's significant number of existing Centrex Plus/Centron lines in those states.

Due to this problem, when Eschelon calls the Qwest repair centers (general repair or DSL repair), the Qwest representative will have no repair record with the information needed to repair a trouble in the DSL portion of the line. The Qwest representative may not even know that the customer has DSL. At a minimum, the customer will experience delays, and Eschelon will have to expend resources on escalating and resolving the problem, if it can be resolved. The DSL may have to be re-installed, because the technical information about the existing DSL service is lost. Qwest has asked Eschelon to provide additional forecasting and conduct additional monitoring of repair issues because of this problem. This imposes extra resource burdens on Eschelon. More importantly, Eschelon's end-user customers will be adversely affected. Also, because Qwest wholesale repair for DSL with Centrex Plus/Centron lines is not truly available for UNE-E or UNE-P, due to the missing repair information, Eschelon is discouraged from selling DSL to its customers.

FURTHER AFFIANT SAYETH NOT.

Dated this 7th day of June 2002.

F. Lynne Powers

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

SUBSCRIBED AND SWORN TO before me this 7th day of June, 2002, by F. Lynne Powers who certifies that the foregoing is true and correct to best of her knowledge and belief.

Witness my hand and official seal.

Douglas L Strand
Notary Public

DOUGLAS L STRAND
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2005

My commission expires:

January 31, 2005

-----Original Message-----
From: Clauson, Karen L.
Sent: Friday, May 25, 2001 3:03 PM
To: 'Andrew Crain'; 'Charles Steese'
Cc: 'jhgalle@uswest.com'; Oxley, J. Jeffery
Subject: FW: §271 Proceeding, AZ Docket No. T-00000-97-0238

Andy and Chuck:

We discussed these data requests with Jim Gallegos, and he indicated that he believed they were served on us inadvertently, given that we are currently not participating in the proceeding at Qwest's request. Therefore, we are not responding to them. If for some reason that is not the case, Eschelon reserves all objections.

As far as provision of residential service in Arizona, Eschelon does not provide residential service. Qwest was present at the certification hearing where Garth Morrisette testified to that. We have found one residential (1FR) line on our bill, after finding that Qwest's monthly performance report shows one residential line. We are checking to see if that is a test customer, or perhaps an error in the data. Other than that isolated instance, however, we do not have residential customers in Arizona.

-----Original Message-----
From: DPOOLE@FCLAW.com [SMTP:DPOOLE@FCLAW.com]
Sent: Wednesday, May 23, 2001 5:13 PM
To: thc@lrlaw.com; kclauson@eschelon.com
Cc: mabdulq@uswest.com; jragge@uswest.com; JHERRON@FCLAW.com
Subject: §271 Proceeding, AZ Docket No. T-00000-97-0238

Attached is Qwest Corporation's First Set of Data Request to Eschelon. I will also be forwarding separately an attachment to the data requests.

Thank you.
<<PGG%01!.DOC>>

PGG%01!.DOC

C

Eschelon telecom, inc

February 8, 2002

Mr. Joseph P. Nacchio (by email and express delivery)
Chairman and Chief Executive Officer
Qwest
1801 California St.
Denver, Colorado 80202

Re: Level 3 Escalation

Dear Mr. Nacchio:

Pursuant to Level 3 of the Escalation Procedures and Solutions Agreement between Eschelon and Qwest, dated November 15, 2000, I ask you to meet with me and resolve the following issues within 10 business days: Platform/UNE-Eschelon ("UNE-E") pricing and compliance by Qwest with terms of our agreements, including the agreement of July 3, 2001 signed by Ms. Audrey McKenney (attached). More generally, we hope that your involvement will improve the business relationship and change its course.

We have not had the opportunity of meeting yet. In public statements, such as those you have made to the Regional Oversight Committee ("ROC"), you have committed to improving the wholesale business relationship and to treating wholesale businesses as customers. Eschelon is a good customer that pays its bills. Last year, we spent approximately $30 million with Qwest. Qwest has said that this makes us your second largest CLEC wholesale customer. We anticipate that our volume of business with Qwest will only grow. Qwest has several times quoted me in press releases and various publications to the effect that Qwest has a pro-competitive attitude and, unlike its predecessor US West, Qwest is serious about developing its wholesale business with CLECs. Rather than take our service and pricing issues before Commissions, the ROC, legislatures, and the press, Eschelon has attempted to resolve matters on a business basis.

We ask you to resolve this escalation by:

- Adopting promised adjusted UNE-E pricing: Agree to the attached proposed amendment to our existing UNE-E Amendment, Attachment 3.2 (with prices that include "premium" for UNE-E versus UNE-P).

- Honoring existing agreements, including July 3rd letter agreement: Pay to Eschelon $2,450,852 for July 3 – Dec. 31, 2001 due under that agreement (by wire transfer for some and agreeing to current adjustments/set offs for remainder).

- Stopping illegal conduct and deal fairly with Eschelon.

As executives, we like to keep things short and to the point. Because the escalated issues are complex and have been discussed over many months, however, I need to set out some background for you before we meet. I will devote the rest of this letter, therefore, to providing you information that you need to know before we talk.

Before Qwest would resolve previous legitimate business disputes that were pending late in 2000, Qwest required Eschelon to agree not to oppose Qwest in 271 proceedings. Based on their actions since then, Qwest's Senior Vice Presidents Ms. McKenney and Ms. Dana Filip appear to believe that, by capitulating to Qwest's demand, Eschelon has subjected itself to accepting poor service and surrendering any ability to protest actions proposed or undertaken by Qwest that would harm our business interests. Qwest has gone so far as to try to make resolution of legitimate business issues contingent upon our destruction or surrender of an auditor's documents as well as to require us to submit testimony, regardless of its validity, in legal proceedings if "suitable" to Qwest. Despite Eschelon telling Qwest orally and in writing that it believes this kind of conduct is illegal and unethical, such tactics continue. We hope that this is news to you and that you will change the course of dealings quickly and put them on a legitimate track.

In the face of such tactics, Eschelon has spent months attempting to resolve these two issues: the pricing of our Platform product and Qwest's failure to provide us with complete access records. Eschelon entered into agreements with a five-year term to purchase a Platform product from Qwest on November 15, 2000. We would not have agreed to a five-year term without assurances that the pricing of our product would remain competitive, and we received such assurances from Qwest during and after those negotiations. Although the prices in the UNE-E Amendment reflect averaged rates, the Parties anticipated that changes would be needed to ensure that Eschelon remains competitive if rates declined, as both parties expected they would, principally due to geographic deaveraging, as Eschelon's lines are in densely populated urban areas. Repeatedly throughout the previous negotiations, Ms. McKenney responded to Eschelon's concerns about possible reductions in UNE-P rates by stating that Qwest would keep Eschelon competitive by adjusting UNE-E rates to reflect such factors. For this reason, the First Amendment to the Confidential/Trade Secret Amendment, dated November 15, 2000, states in Paragraph 5 that the Parties will address appropriate price adjustments in quarterly meetings. Despite this, Qwest has failed to adjust the UNE-E rates to reflect changes that have occurred since signing the UNE-E Amendment.

We explored an alternative of attempting to negotiate a conversion to UNE-P instead of adjusting UNE-E prices, but that effort failed when Qwest would or could not even confirm the pricing much less address our other concerns about alleged benefits to us. Therefore, we need to pursue our existing UNE-E contract rights, including Qwest's commitment to adjust the pricing. If Qwest has taken any steps to effectuate the UNE-P conversion, Qwest needs to ensure that those steps are reversed. Please ensure that any plans to convert our base to UNE-P are halted. If we want to move any lines to UNE-P, we will simply do so under our current interconnection agreements. Qwest needs to make good on its initial and repeated commitment to provide us with adjusted UNE-E rates.

Our pricing ask to you is simple: Eschelon and Mr. Arturo Ibarra of Qwest have developed a methodology for determining how our UNE-E rates should be adjusted downward. Attached is pricing that reflects our proposal using that methodology. The proposal is in the form of an amended attachment to the previous UNE-E interconnection agreement amendment. As with the current prices, the adjusted prices would be subject to all of the other terms of the amendment (such as the current revenue commitment, *etc.*). You and I need only settle the issue of Qwest's requested, additional "premium" for advantages that Qwest claims UNE-E offers over UNE-P. Qwest previously proposed $2.00 for the "premium." We believe that Qwest included in that amount some assumed benefit from receiving DSL with UNE-E, but DSL is now also available with UNE-P. In addition, Qwest's proposed "premium" charge reflects an assumption for features that is higher than the $0.75 that Qwest proposed as its estimated cost for features in the Utah cost docket. Therefore, we believe the "premium," if applicable at all, is closer to $1.10. I propose we split the difference and add a "premium" of $1.55 per line, per month. The attached rates reflect this proposal.

Once we resolve the pricing issue, you and I need to re-establish the Qwest-Eschelon relationship on solid ground. Although much of the past and present negotiations have focused on pricing, Eschelon has consistently indicated that quality of service is of paramount importance to our business. We asked Qwest to deal with quality of service through specific commitments in the first set of agreements in 2000, but Qwest would agree only to a general Implementation Plan that was supposed to establish a process for improving quality of service. Although Qwest's service quality has improved in some areas, significant problems remain. Many of these issues are reflected in a monthly Report Card that Eschelon presents to Qwest. From January through November, on average, more than 65% of the measures have been rated as unsatisfactory. We had to remove the billing accuracy measure from our Report Card, because 100% of our UNE-E bills are inaccurate and will be inaccurate until Qwest completes the process necessary to provide UNE-E, rather than resale, bills (which it committed to do by 1Q of last year). Additionally, Qwest has not performed satisfactorily with respect to generating and reporting switched access minutes of use ("MOU"). Qwest has been shorting Eschelon switched access minutes, and Qwest/Arthur Andersen, your auditor, has recognized that. All of these performance problems affect not only our bottom line but also our reputation, and therefore they threaten our ability to compete in the marketplace.

To mitigate our concern that Qwest was denying us essential facilities on reasonable and nondiscriminatory terms, Ms. McKenney executed an agreement on July 3, 2001. That agreement provided Eschelon with $150,000 per month as compensation for poor performance and compensated us for underreported access minutes. We agreed that the performance payment would not stop until <u>both</u> parties agreed that performance had improved sufficiently. The Parties also agreed that the access payments issue would be resolved by a joint audit. The joint audit was to continue until the auditor came to agreement, within plus or minus five percent, of the actual number of access minutes.

Qwest unilaterally terminated the work of its auditors before the audit concluded. Qwest has not paid its obligations under the July 3rd agreement for months. Qwest has made clear its desire to terminate the July 3rd agreement. Eschelon has been willing to accede to Qwest's request, but only if we resolved our pricing, access and service issues. The July 3rd agreement is in full effect, and I expect you to see that Qwest honors its commitments in that letter.

Our access ask to you is simply to bring your payments current under the fully effective and enforceable July 3rd letter agreement. Qwest needs to pay to Eschelon $1,077,461, in addition to the $1,373,391 that Eschelon has had to set off in payments to Qwest, to be current through the end of 2001. Since July 3rd, the only amount that Qwest has paid under that agreement is $450,000. That amount represents only three months (July-September) of the $150,000 in service credits due each month to Eschelon. The total amount due under the July 3rd letter (after subtracting the $450,000 paid to date) is $2,450,852 ($1,373,391 which Eschelon has withheld in billing adjustments) through December 31, 2001. This total amount includes a voluntary downward adjustment for the time period November 1, 2001 through December 31, 2001 that Eschelon offered to Qwest because Eschelon had hoped Qwest would negotiate in good faith and resolve this issue. Although that did not happen and therefore Eschelon could request the higher amount, Eschelon honors its word and has included this downward adjustment in calculation of the amount due.

As to re-establishing our business relationship on a mutually respectful basis, much needs to be done. Qwest's bad conduct has not been inadvertent or unintentional. Qwest has used threats and inappropriately exploited its monopoly power to convey that service will only get worse and Eschelon will suffer if it does not capitulate to Qwest's unreasonable demands. I offer three compelling examples of Qwest's bad conduct:

> Threats and abuse of monopoly power. Ms. Filip, who as Qwest's Executive Vice President for Wholesale holds our lines in her hands, told members of my senior management team that she would make our lives miserable if our employees did not immediately leave a Change Management Re-Design working session. We had every right to be at that session, and we were raising legitimate issues that matter to our everyday business. Given the real harm that someone in Ms. Filip's position could do to a business such as ours, we had no choice but to capitulate. Specifically, on a conference call with the participation of Mr. Greg Casey on October 30, 2001, Ms. Filip threatened that, if our representatives did not leave the meeting immediately, Ms. Filip would *devote all of her energies* to ensuring that Ms. McKenney succeeded in her objectives. This told us two things: (1) that Ms. Kenney's objectives are adversarial to those of Eschelon, even though Ms. McKenney represents that she is attempting to further her customer's interests through a "business-to-business" relationship; and (2) that Ms. Filip would use her position to intentionally harm our business. When we later repeated this incident and Ms. Filip's threat to make our lives miserable on a conference call with Mr. Gordon Martin, Ms. Filip, Ms. McKenney, and Mr. Richard Corbetta, not only did no one deny the incident, but also Mr. Martin expressed no surprise and made no indication that this type of conduct might not

be acceptable to him. Mr. Martin simply said that, while Eschelon appeared to be "passionate" about this issue, he was passionate about other issues.

Request to Destroy and Appropriate Audit Documents. Qwest retained Arthur Andersen, and Eschelon retained Pricewaterhouse Coopers ("PWC") to determine whether Qwest's reporting of access minutes was accurate. Clearly, Qwest has been shorting Eschelon switched access minutes. Qwest claimed that the flaws would be eliminated if Eschelon moved to a mechanized UNE-E access process. Two weeks after Eschelon moved to that process, however, Qwest said it was not working (and Eschelon had to return to the old process). Before we moved to the new process, Ms. McKenney told me, over many months, that our position on this issue was wrong, because other carriers were using the new process without complaint. She specifically identified McLeod as a carrier using the new process. If that were true, the process would have worked when we moved to it. It did not. In other words, Ms. McKenney's representations were false. Even worse, *Qwest told Eschelon that it would condition payments otherwise legitimately due to Eschelon upon Eschelon's destroying any evidence of Qwest's access problem, including the auditor's records.* Specifically, on a conference call with the participation of Mr. Greg Casey on October 30, 2001, Ms. McKenney told me to destroy the access audit records or give them all to her. The same day, she also faxed to Eschelon proposed written agreements, signed by Ms. McKenney, that required Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process described in" the July 3, 2001 letter agreement within 10 days. These documents belong to Eschelon by virtue of its access audit that was paid for solely by Eschelon. Ms. McKenney made it very clear that she wanted no written evidence of the access results documenting missing switched access minutes. Although we realized that we were at great risk due to Qwest's ability to harm our business, we simply could not participate in such conduct and expose our own business to legal liability.

Attempts to Improperly Influence Testimony. In the same discussions of resolving switched access issues, Qwest also brought into the discussion the outside and unrelated issues of Eschelon's "performance" with respect to regulatory proceedings (on any issue, not merely access). In Qwest's proposed agreements faxed to me on October 30, 2001, Qwest conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." The document, signed by Ms. McKenney, provided no limitation on Qwest's requests, such as that the testimony requested be true and accurate. The agreement simply contained an offer of a monetary inducement to obtain testimony upon request. The same document required that the agreement remain confidential. Therefore, if Eschelon agreed to the proposal, it would be placed in the position of having to offer testimony without disclosing a fact that would bear on the veracity of that testimony – it had been induced. Again, Eschelon could not agree to participate in such activity and rejected the offer. Also, on November 12, 2001, Rick Smith discussed his concerns about the proposal with Ms. Filip and told her that he believed the proposal was illegal and embarrassing. When, on

January 11, 2002, Eschelon later read the offensive language from the proposed agreement to Mr. Martin, in response to a claim by Ms. Filip that Qwest's conduct in this relationship has been "constructive," Mr. Martin expressed no surprise and made no indication that this type of conduct might not be acceptable to him.

In my first meeting with Mr. Martin, I talked with him, in particular, about my concerns regarding Ms. McKenney's behavior. I asked that she be removed from our account, so that we could deal with someone else. Mr. Martin declined that request and, as these examples show, has not given us any indication that he disapproves of her approach. Unless you condone such conduct, these examples must convey to you the seriousness of these issues, the unacceptable position in which they place Eschelon, and the legal risks that they pose to Qwest.

Despite Qwest's conduct, Eschelon has continued to persevere in its attempts to work with Qwest. Qwest is the only available supplier in virtually all cases. We have cooperated with requests by Qwest to support Qwest with favorable comments, when we believed we could legitimately do so. This has included, for example, statements to the press and a letter to state regulatory commissions supporting aspects of Qwest's PAP. Even in these circumstances, Qwest has turned a potentially positive development into a concern. For example. Qwest drafted and published a statement, which Qwest attributed to me, before I ever saw it. Later, I had little choice but to acquiesce, even though I would have phrased the statement differently, if consulted. I asked Qwest to always consult me in the future. Just recently, however, I noticed that Qwest has re-published the previous quote in Qwest's *Lightspeed* publication, without consulting me. Let me make it very clear now that I retract my previous statements in support of Qwest and all authority that Qwest has to use them. A new course needs to be charted for this wholesale business relationship, but until we have done that, I cannot, in all honesty, say anything good about Qwest.

The previous phases of this escalation have taken far too long. We would like to complete this phase within the allotted 10-day time period. We hope to resolve the outstanding issues to avoid bringing the issues to arbitration before the state commissions under our interconnection agreements and before initiating other legal actions, such as an antitrust suit. To do that, we need to move quickly. Please let me know when you are available to meet with me to discuss these escalation issues.

Sincerely,

2/8/02
Mr. Richard A. Smith
President, Chief Operating Officer & Director

cc: Drake S. Tempest (by email & express delivery)
Gordon Martin (by email)
Audrey McKenney (by email)
Dana Filip (by email)
Richard Corbetta (by email)

AMENDED ATTACHMENT 3.2

PRICES FOR OFFERING

STATE	PLATFORM RECURRING	ADDITIONAL CHARGE FOR EACH 50 MINUTE INCREMENT > 525 ORIGNATING LOCAL MOU/MONTH PER LINE
AZ	20.82	0.280
CO	18.18	0.295
ID	33.50	0.295
MN	21.83	0.205
ND	28.65	0.260
NE	36.39	0.300
NM	27.50	0.140
OR	18.78	0.170
UT	22.52	0.270
WA	18.03	0.195

Exhibit A sets forth features that are included in the flat-rated UNE-P Business Recurring Rate, in all forms of those features (except as part of an enhanced service).

D

EXHIBIT D

CONFIDENTIAL

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LEGAL

eschelon telecom, inc.

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July 10, 2002

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LEGAL DIV.
ARIZ. CORPORATION COMMISSION

By facsimile & overnight mail

Commissioner Marc Spitzer
Commissioner Jim Irvin
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007-2996

Re: AZ Docket Nos. RT-00000F-02-0271, T-00000A-97-0238

Dear Commissioner Spitzer and Commissioner Irvin:

Eschelon Telecom, Inc. ("Eschelon") received a copy of your letters to the Parties in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. Commissioner Spitzer asked the parties to address the differences in the letters submitted by Qwest and Eschelon. Therefore, Eschelon submits this Reply to Qwest's letter to the Commission of June 27, 2002 ("Qwest's June 27 Letter") and the Response of Qwest Corporation to Staff's Request for Comment dated June 27, 2002 ("Qwest's Comments"). Because Qwest criticized Eschelon's previous letter as "unverified rhetoric" (*see* Qwest's June 27 Letter, p. 1), Eschelon attaches exhibits to further support the information provided.

Change Management Process

The Change Management Process ("CMP") is a primary example of an area in which the information provided by Eschelon and Qwest varies greatly. Eschelon has participated in the CMP (formerly "CICMP") for about as long as any Competitive Local Exchange Carrier ("CLEC"). Although Qwest's June 27 Letter and Qwest's Comments characterize CMP as though it were an arm of the 271 process, that is not the case. Eschelon's participation in CMP was not some effort to involve itself in the 271 proceedings. Quite the reverse is true. Long after Eschelon's initial participation in CMP, some 271 issues were interjected into the CMP-Re-design process when Qwest referred issues from the 271 workshops to the CMP Re-design team. Although some 271 issues were discussed, participation in CMP is far from being the same as participation in 271. Issues raised in monthly CMP meetings were not necessarily brought to the 271 proceedings. These include commercial performance issues. Even if another party mentioned some of these issues in 271 proceedings, the participants in those proceedings did not have the benefit of explanation by Eschelon, which had first-hand commercial experience with the problems.

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Because CMP is an important issue about which Qwest's filings vary greatly from Eschelon's information, Eschelon will provide additional information from which the Commission may decide which party more accurately and fairly captured the course of events.[1] About CMP, Eschelon said:

> Qwest had Eschelon representatives pulled from CMP Re-Design meetings, reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report, required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs, and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming known. Finally, Eschelon's President personally attended CMP monthly and Re-Design meetings to determine whether Qwest's attacks on Eschelon representatives were fair and whether Qwest's representations that CMP issues could be resolved just as well outside of CMP were accurate. Eschelon's President concluded that Qwest's statements were not fair or accurate and the Eschelon's CMP participation was appropriate and necessary to resolve critical business issues. Eschelon's President encouraged Gordon Martin of Qwest to also attend the CMP meetings to gain an understanding of that process and Eschelon's perspective. Mr. Martin did not do so.

See Eschelon's Letter to Commissioner Spitzer, p. 5 (June 24, 2002) ("Eschelon's June 24 Letter"). Qwest did not address Eschelon's first statement from the above quotation about CMP (that Qwest had Eschelon representatives pulled from CMP Re-Design meetings) in Qwest's June 27 Letter or Qwest's Comments. Therefore, Eschelon will respond to the issues Qwest did address first and then return to this issue.

Comments on CMP Status Report

Eschelon's second statement about CMP was that Qwest "reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report." Eschelon's June 24 Letter, p. 5. In response to this statement, Qwest said: "In fact, Eschelon ***only*** submitted specific comments regarding Qwest's monthly CMP re-design status reports ***on a single occasion***." Qwest's June 27 Letter, p. 2. (emphasis added). Enclosed, however, are copies of specific comments regarding Qwest's monthly CMP re-design status submitted by Eschelon to Qwest on ***two*** occasions. *See* Exhibits 2 - 3.[2] As Eschelon indicated in Eschelon's June 24 Letter, Eschelon's October 2001 comments are critical of Qwest's status report. *See* Exhibit 2. Eschelon submitted a copy of Exhibit 2 to Greg Casey, Audrey McKenney, and Dana Filip of Qwest on Friday,

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[1] *See* Exhibit 1 (Verification of F. Lynne Powers).

[2] Qwest states that it attached a copy of Eschelon's redlined version of the status report as an exhibit to the report. *See* Qwest's June 27 Letter, p. 2. Qwest attached Eschelon's comments with respect to Exhibit 3 (*see* Exhibit 4), but not Exhibit 2. Qwest also refers to a "high level" email submitted by Eschelon. *See* Qwest's June 27 Letter, p. 2. A copy of that separate email is attached as Exhibit 5.

October 5, 2001 and to Andrew Crain on October 9, 2001. *See* Exhibit 2 (cover email to Mr. Crain). Ms. Filip is Qwest's Senior Vice President of Global Service Delivery, and Mr. Crain is a Qwest attorney. Both Ms. Filip and Mr. Crain are Core Team Members of the CMP Re-design Team. *See* Exhibit 6.

After Eschelon submitted its October 2001 comments on Qwest's CMP status report to Qwest, Mr. Crain reportedly mentioned the comments to WorldCom's attorney Thomas Dixon. Mr. Dixon is an active member of the CMP Re-design Team and active participant in the 271 proceedings in several states, including Arizona. Mr. Dixon asked Mr. Crain for a copy of Eschelon's comments. Mr. Crain responded that he was "mixed up." *See* Exhibit 7. Although Mr. Crain had Eschelon's comments in his possession at the time, as shown by Exhibit 2, Mr. Crain told Mr. Dixon that Eschelon had not "sent anything." *See* Exhibit 7. Despite these facts, Qwest represents to the Commission that "Qwest in no way attempted to limit the distribution or use of Eschelon's comments." Qwest's June 27 Letter, p. 3.

With respect to the October 2001 comments, Eschelon management agreed to provide them directly to Qwest management, instead of submitting them by email to the entire CMP Re-design Team. Eschelon did so for two reasons: (1) to show a spirit of cooperation because Qwest had indicated that it would resolve pressing disputes with Eschelon (which it later did not do); and (2) to respond to attacks by Ms. Filip and Ms. McKenney on Eschelon's participation in the CMP Re-design process made with the purpose of decreasing that participation. *See* Exhibit 8; *see also* discussion below. In these situations, Ms. McKenney sometimes characterized Eschelon as a "bad" business partner. Given Qwest's monopoly supplier position, Eschelon did not need to be expressly reminded that Qwest had the ability to punish conduct it deemed to be "bad."

<u>Withdrawal of Change Request Relating to Qwest Anti-Competitive Conduct</u>

Eschelon's third statement about CMP was that Qwest "required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs." Eschelon's June 24 Letter, p. 5. In September of 2001, CLECs participated in a call to discuss CMP issues. One of the issues discussed was whether a Change Request would be the appropriate vehicle to raise with Qwest the topic of anti-competitive conduct. Allegiance Telecom ("Allegiance") said that it had recently experienced instances when it believed Qwest personnel gave false information to Allegiance's customers (such as that the customers' service would go down if they proceeded to converting with Allegiance). Eschelon said it had recently had a similar experience. They agreed that a Change Request would be an appropriate avenue for addressing these issues.

On or about September 25, 2001, Allegiance submitted its initial Change Request relating to this issue. *See* Exhibit 9. Allegiance asked Qwest to establish an improved process for reporting occurrences of anti-competitive behavior, including a single point of contact, a thorough investigation, an appropriate and timely response to CLECs, and proper training of Qwest personnel to prevent future occurrences. *See id.* Qwest assigned the Change Request number PCC092701-3. *See id.* The initial Change Request contained the name and badge number for the Qwest technician alleged to have made inappropriate statements. Eschelon copied the description of the Change Request, containing this information from Qwest's web page. *See id.* Shortly afterward, Eschelon could not find the Change Request on the web page. Today, a slightly modified version of the Change Request (without the technician-identifying information) is posted on the web page with the archived Change Requests, and it has a "Withdrawn" status. *See* Exhibit 10. Allegiance has indicated that Qwest met with Allegiance in October of 2001 and that Qwest, including Ms. McKenney, asked Allegiance to withdraw the Change Request. Qwest's written Status History for the Change Request (posted on the Qwest web page), however, does not document the meeting between Allegiance and Qwest or the fact that Qwest asked Allegiance to withdraw the Change Request. *See* Exhibit 10.[3]

On September 28, 2001, Eschelon also submitted a Change Request relating to this issue to the Qwest CMP. *See* Exhibit 11. Eschelon described a situation in which a Qwest representative told a customer switching to Eschelon that Eschelon was filing for bankruptcy, which was not a true statement. *See id.* Eschelon asked Qwest to develop a written process to help prevent similar situations in the future. *See id.* Eschelon asked Qwest to include in the process steps for training Qwest employees, reporting the conduct, responding to such situations, and communicating to CLECs on the action taken. *See id.* As in the case of the Allegiance Change Request, Eschelon was seeking a process solution and was not simply reporting an isolated incident.[4] Qwest is required to provide a Change Request number to the requesting CLEC and log that number into its database within two days after receiving a completed CR. *See* CMP Document at § 5.3.[5] Qwest did not do so and said, on October 10, 2001, that it had not provided a number because it was "clarifying this issue internally." *See* Exhibit 12. The documented CMP process does not provide for such a step. Qwest (Ms. McKenney and Ms. Filip) asked Eschelon to withdraw the Change Request from CMP, indicating Qwest did not believe

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[3] When Eschelon later raised an issue relating to the handling of these Change Requests with the CMP Re-design team, Qwest criticized Eschelon for using technician-identifying information in its Change Request and stated that this was one of the reasons that Qwest asked Eschelon to withdraw the Change Request. Eschelon pointed out that this was not the reason given to Eschelon at the time and that Eschelon's Change Request did not contain technician-identifying information. Qwest confused the Change Requests submitted by Allegiance and Eschelon. Eschelon did distribute the Allegiance Change Request to the Core Re-design Team at the later date, but the information provided was taken from Qwest's published web page.

[4] Eschelon remains dissatisfied with Qwest's approach to these issues. Since then, Eschelon has reported to Qwest additional instances of inappropriate comments by Qwest representatives to Eschelon customers. Afterward, Qwest provides, at most, a vague statement that Qwest investigated and will take appropriate steps. Eschelon does not know what steps were taken either in the particular case or to avoid additional instances in the future. If Qwest had accepted the Change Requests of Eschelon and Allegiance, perhaps a better process would be in place by now.

[5] *See* http://www.qwest.com/wholesale/cmp/re-design.html.

that circulating such examples to other CLECs was consistent with the requirement not to oppose Qwest in 271. Eschelon withdrew the Change Request.

Qwest admits that it asked Eschelon to withdraw the Change Request. *See* Qwest's June 27 Letter, p. 3. Qwest claims that its only reason for doing so was that the "issue related to employee performance, rather than a systemic process issue." *Id.* In that case, according to the governing CMP Document and consistent with the handling of other Change Requests at the time, Qwest should have assigned the Change Request a number, posted the Change Request on its wholesale web page, stated in a written response its position that the issue related to employee performance, posted that response (and its request to withdraw) as part of the Status History, and given the Change Request a published status of "Withdrawn." Qwest followed none of these documented procedures.

Moreover, in both the Eschelon and the Allegiance situations, Ms. McKenney was involved in asking a CLEC to withdraw a Change Request. Ms. McKenney is Senior Vice President of Wholesale Business Development at Qwest. Ms. McKenney is not a member of the CMP team or the service management team. Ms. McKenney handled the bulk of the negotiations of unfiled agreements with Eschelon. The reason given by Qwest for its request to withdraw the Change Request does not explain Ms. McKenney's involvement.

<u>**Other Qwest Steps to Inhibit Eschelon's CMP Participation**</u>

Eschelon's fourth statement about CMP was that Qwest "took other steps to inhibit Eschelon's participation in CMP/CMP Re-design and prevent information from becoming known." Eschelon's June 24 Letter, p. 5. Qwest claims that Eschelon's participation in CMP was "full" and "never restricted." *See* Qwest's June 27 Letter, p. 3 & Qwest's Comments, p. 7. In April and June of 2001, however, Ms. McKenney of Qwest was calling Eschelon's President to complain that Eschelon should not be participating in Qwest's CMP meetings. Eschelon attempted to reason with Qwest by explaining Eschelon's business need for participating in CMP and describing the competitive disadvantage to Eschelon if prevented from participating in CMP. *See, e.g.*, Exhibit 13. A comparison of Exhibit 13 with Qwest's June 27 Letter and Qwest's Comments raises the question of why Eschelon had to make these arguments at all, if Eschelon's participation in CMP was as free and uninhibited as suggested by Qwest. Note that Ms. McKenney did not write back to Eschelon and say that there has been some misunderstanding and, of course, Eschelon could participate freely in CMP. That was not Qwest's position.

Qwest's efforts to inhibit Eschelon's CMP participation also extended to CMP Re-design meetings. In October of 2001, for example, Ms. Filip specifically asked Eschelon to refrain from participating in a CMP Re-design Team discussion of the interim process for the Qwest Product Catalog ("PCAT"). *See* Exhibit 8. Despite

Eschelon's strong objections to the PCAT process, Eschelon believed it did so, as Qwest requested. *See id.* Nonetheless, Ms. Filip called Eschelon immediately after that session to complain that Lynne Powers of Eschelon had provided some comments when she should have been silent. The effects of Eschelon's silence on this particular occasion far outlasted the particular meeting. Qwest made many changes to the PCAT with either no notice to CLECs of the particular change or at least no red-lining accompanying a notice to show the nature of the change. By the time Eschelon was able to participate on this issue again, Qwest argued that it was too late to go back and provide information to CLECs on the changes made earlier. Therefore, Eschelon and other CLECs never received red-lined documents showing what had changed for many changes to the PCAT.

Ms. Filip and Ms. McKenney generally took the position that the Escalation Letter barring Eschelon from participating in 271 proceedings[6] also entailed that Eschelon should either be silent or support Qwest's position on other issues in the CMP monthly and Re-design processes. Qwest said that Eschelon had an obligation to deal directly with Qwest executives instead of raising issues in the CMP arena. Eschelon did not believe, however, that Qwest could separately address the types of issues Eschelon raised in those proceedings without affecting other CLECs and that consequently a bilateral approach would be futile. Eschelon provided Qwest management with a summary of Eschelon's pending and recently closed Change Requests to attempt to show the detailed nature of the issues, many of which affected other CLECs, to convince Qwest of Eschelon's legitimate business need to raise in the context of CMP. *See* Exhibit 8. Again, if Qwest was not opposing Eschelon's participation in CMP, the question is raised as to why Eschelon needed to expend resources creating such summaries and trying to persuade Qwest of the need for Eschelon's participation. Qwest verbally opposed Eschelon's arguments. On October 16, 2001, Ms. Filip told me and Eschelon's President on a conference call that Qwest expected Eschelon to not only withdraw the Change Request discussed above but also limit Eschelon's participation in other ways. For example, Ms. Filip asked Eschelon to reduce the number of communications to other CLECs and the testers[7] concerning Qwest's failings (such as by not copying emails to other members of the CMP Re-design Team) and discuss performance issues off line rather than in meetings attended by others.

The arguments with Qwest about the "allowable" level of Eschelon's participation in CMP and CMP Re-design continued for months. Although Qwest appears to praise Eschelon's participation in the CMP process in its letters to the Commission, Qwest does

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[6] *See* Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") (copy attached as Exhibit 14).

[7] For example, on April 3, 2001, Qwest's attorney Laurie Korneffel told Eschelon that Qwest was "comfortable" that Eschelon's participation in a KPMG question/answer proposal would not violate the agreement not to oppose Qwest in 271, but she said that Qwest "would not be in favor of Eschelon serving as a 'test' CLEC." *See* Exhibit 15. Eschelon had to inquire of Qwest as to the boundaries of the limitations on Eschelon's participation, because it had become clear that Qwest interpreted the 271 limitation more broadly than Eschelon.

not disclose that verbally it took a very different stance in its ongoing discussions with Eschelon at the time. Ms. Filip and Ms. McKenney represented that Eschelon's representatives were causing "havoc" in the CMP monthly and Re-design meetings. *See id.* On January 12, 2002, Eschelon's President summarized Qwest's attempts to decrease Eschelon's CMP participation over the last year as a "constant irritant" to the business relationship. *See* Exhibit 16.

In an attempt to put the issue to rest and prove Eschelon's position, as indicated in Eschelon's June 24 Letter (p. 5), Eschelon's President asked Qwest's Executive Vice President of Global Wholesale Markets Gordon Martin to attend the CMP and Re-design sessions, as Eschelon's President had done. *See id.* Along with Ms. McKenney, Mr. Martin was intimately involved in the negotiations with Eschelon, including negotiation of proposed terms that would limit Eschelon's participation in CMP.[8] Eschelon's President told Mr. Martin that CMP attendance "is the only way that you can determine what goes on as both sides have different views as to what happens at these sessions." *See id.* Exhibit 16 clearly shows that Eschelon's request for Mr. Martin's attendance was made in the context of resolving the issue of Qwest's persistent requests to limit Eschelon's CMP participation. Nonetheless, Qwest's Letter reads as though Eschelon made an unrelated and unprecedented request for upper management to attend CMP meetings. *See* Qwest's June 27 Letter, p. 3. Qwest then represents to the Commission that there "was nothing wrong with Qwest's selecting its representatives who had knowledge about the detail at issue at CMP meetings." *Id.* Eschelon agrees that knowledgeable Qwest employees should attend CMP meetings. This is not, however, the issue that the Commission seeks to investigate and upon which Eschelon commented. The relevant issues are the reason for Eschelon's request that Mr. Martin participate in some CMP meetings and Mr. Martin's (and Ms. McKenney's) conduct in pressing Qwest's efforts to decrease Eschelon's CMP participation without personally observing the Eschelon behavior that Qwest employees characterized as causing "havoc."

Excluding Eschelon From CMP Meetings

As mentioned above, Qwest did not address Eschelon's first statement about CMP in its June 24 Letter -- that Qwest "had Eschelon representatives pulled from CMP Re-Design meetings" -- in Qwest's June 27, 2002 Letter or Qwest's Response. It does not do so, even though Qwest directly responded to Eschelon's statements about Qwest's not disclosing comments on a status report and asking Eschelon to withdraw a Change

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[8] Eschelon took the position that, if Qwest was going to impose limitations on Eschelon's CMP participation, Qwest needed to be clear in its expectations, so that Eschelon would not continue to be criticized by Qwest after the fact for alleged infractions. At a meeting on January 8, 2002, Ms. Filip agreed to provide clear, written expectations to Eschelon by January 11, 2001. On January 11, 2002, Mr. Martin said that Qwest's legal department advised not to provide a written list. He said that, instead, Ms. Filip would call Eschelon to verbalize a list and then there would be some documentation of agreed upon issues. Ms. Filip did not provide a verbal list or later documentation after that date. The parties did not agree on this issue.

Request. Eschelon believes a reasonable conclusion to draw from Qwest's silence on the specifics of this point is that Qwest admits that it pulled Eschelon representatives from CMP Re-design meetings. Qwest broadly states, however, that Eschelon's participation in CMP Re-design was "never restricted," Qwest's Comments, p. 7, so this assertion needs to be addressed.

Qwest excluded Eschelon from virtually all of the Qwest CMP Re-design meetings that took place on October 30, 2001 through November 1, 2001. Lynne Powers of Eschelon planned to participate in those sessions by telephone, and Karen Clauson of Eschelon flew to Denver at Eschelon's expense with the plan of staying through the November 1st meeting. *See* Exhibit 17. As indicated on Qwest's Attendance Record for that meeting, however, Eschelon did not participate on either October 31 or November 1, 2001. *See* Exhibit 18 at Attachment 1. The minutes of the meeting show that both Ms. Powers and Ms. Clauson participated in the meeting on the morning of October 30. *See id.* During this portion of the meeting, the parties were reviewing the agenda and indicating topics that they would like to cover. Eschelon listed several topics. *See id.* After Eschelon started to do so, Ms. Filip left the meeting and participated in a conference call with William Markert, Robert Pickens, and myself of Eschelon.

During the call on October 30, 2001, Ms. Filip threatened that, if Ms. Powers and Ms. Clauson did not stop participating in the meeting immediately, Ms. Filip would *devote all of her energies* to making Eschelon miserable. Specifically, Ms. Filip said, in an angry manner, that she would devote all of her energies to ensuring that Ms. McKenney succeeded in her objectives. I personally heard her make this statement. *See also* Exhibits 19 - 20 (Verification Affidavits of Mr. Markert and Mr. Pickens).[9] This told Eschelon two things: (1) that Ms. McKenney's objectives were adversarial to those of Eschelon, even though Ms. McKenney represented that she is attempting to further her customer's interests through a "business-to-business" relationship; and (2) that Ms. Filip would use her position to intentionally harm Eschelon's business. Ms. Filip, as Qwest's Senior Vice President for Global Service Delivery, holds Eschelon's lines in her hands. Given the real harm that someone in Ms. Filip's position could do to a business such as Eschelon's, Eschelon had no choice but to capitulate. Ms. Powers dropped off the call. Ms. Powers joined the conference bridge to ask Ms. Clauson to leave the meeting to take a call from her in the hallway. Afterward, as a result, Ms. Clauson had to check out of

[9] Because Qwest made these statements verbally and not in writing, it has the advantage of saying that Eschelon cannot provide written evidence of Qwest's own statements. In addition to affidavits from Eschelon's participants in the conversation, the Commission has the outside evidence showing that Eschelon intended to participate fully in the meetings but then left abruptly. *See, e.g.,* Exhibit 17. When viewed in the context of all of the other Exhibits provided with this Reply, that conduct is consistent with the evidence that Qwest was attempting to limit Eschelon's participation in CMP. Similarly, Eschelon's statements in its February 8, 2002 letter (discussed in Qwest's Comments, p. 8) should be read in the context of all of the Exhibits to this Reply and, in particular, Exhibit 21. Given Qwest's heavy reliance on oral communications (even including at least one oral agreement with a competitor, *see* Qwest's Comments, at 8), the Exhibits are as much or more written documentation as can be expected to dispute the claims in Qwest's June 27 Letter and Qwest's Comments.

her hotel early and return to Minneapolis. *See* Exhibit 17. Eschelon had raised issues that it believed needed prompt discussion, but Eschelon did not participate in the remainder of the meeting on October 30, or the meetings on October 31 and November 1. Despite Qwest's statements to the contrary, being excluded from meetings restricts participation in the process and prevents a party from raising issues at those meetings. *Cf.* Qwest's Comments, p. 7 ("never restricted") & Qwest's June 27 Letter, p. 3 ("No re-design participant, including Eschelon, has ever been prevented from raising any issue during that process.").

Timing of Qwest's Ending Specific Payments to Eschelon

As indicated, the arguments with Qwest about the "allowable" level of Eschelon's participation in CMP and CMP Re-design continued for months, over which time Eschelon became more resolved that it needed to participate in the meetings. In other words, over this period of time, it became clear to Qwest that Eschelon was not going to remain silent or just do as it was told. As Eschelon pointed out in its June 24 Letter (p. 5, note 14), during the same general time frame[10] when Qwest was having this realization, Qwest stopped making payments to Eschelon, despite written contractual obligations to pay Eschelon. Although Qwest is well aware of the facts, Qwest complains in its June 27 Letter (p. 4) that Eschelon's statements are "vague and non-specific." To address that complaint, Eschelon will be clear about the payments that Qwest stopped, the timing, and the effect on Eschelon.

The Consulting Fee Agreement (¶ 3) required Qwest to pay Eschelon "an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest November 15, 2000 through December 31, 2005."[11] A later agreement provided that Qwest would pay this amount to Eschelon on a quarterly basis. This is a written contractual obligation that Qwest has defended as a legitimate settlement agreement. Qwest is not claiming that Eschelon breached this provision. To the contrary, Qwest recently submitted sworn testimony indicating that Qwest now places a "very high value" on the consulting services of Eschelon.[12] Given that according to Qwest's own account Eschelon was in compliance with the written contract, no legitimate basis existed for Qwest to stop payment under that agreement. Qwest stopped paying Eschelon pursuant to this provision, however, after August of 2001. In the

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[10] Eschelon uses the term "general" time frame because Qwest payments may be late or may not be due for a set period of time. Therefore, the exact date on which Qwest stopped payments can be difficult to pinpoint.

[11] *See* Confidential Amendment to Confidential/Trade Secret Stipulation (Nov. 15, 2000) ["Consulting Fee Agreement"], at ¶ 3; provided by Eschelon in response to Staff Request Number 1:2 in Docket Number RT-00000F-02-0271.

[12] *See* Qwest Corporation's Written Direct Testimony of Judith Rixe, p. 9, line 15, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197 (April 22, 2002) ["Rixe Testimony"].

absence of a breach, one looks for other factors to explain Qwest's refusal to honor its contractual commitment while Eschelon was providing services of "high value."

Qwest claimed that it was withholding payment because Eschelon had complained that switched access minutes were missing and that Qwest had not delivered on its promise to negotiate pricing adjustments, and negotiations were continuing as to these and other issues. Those issues, however, were separate from the undisputed consulting fee. Qwest could have continued to honor its written obligation to pay the consulting fee, as it was required to do by the contract, while disputed issues were negotiated. Instead, Qwest made it a condition of resolution of Eschelon's legitimate access, service quality, and pricing complaints that the Consulting Fee Agreement be terminated.[13] Unilaterally enforcing its position, Qwest stopped paying the consulting fee. The last payment was for August of 2001.[14] There is a correlation between the timing of Eschelon's assertion of its various rights and Qwest's stopping of the payments. Qwest knew full well the impact of its action, particularly in the prevailing telecommunications market. Because bankruptcies were so common at that time, one could hardly open a telecommunications publication during this period without reading about another one. Qwest earns more revenue by the second day of January in each year than Eschelon earns in an entire year. Qwest knew which party's bargaining position would be most adversely affected by its decision to stop payments.

When Eschelon raised this issue previously, Eschelon said that it "does not know whether any CLEC that did stop its participation in CMP, if any, continued receiving payments whereas the payments to Eschelon stopped." *See* Eschelon's June 24 Letter, p. 5, note 14. As indicated, Eschelon does not have access to all of the information necessary to make this determination. Eschelon is aware that other unfiled agreements between other carriers and Qwest have been disclosed, including an agreement or agreements that require payments to McLeodUSA. McLeodUSA was initially a CMP Core Team Member, but its status was changed for failure to participate actively in the working sessions. *See* Exhibit 18, pp. 11-12. Eschelon has had no opportunity to review the various McLeodUSA agreements, nor is it requesting that here. Eschelon can only state that it cannot confirm one way or another whether McLeodUSA (or any other

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[13] Qwest attempted to impose other conditions as well, as discussed below with respect to the proposals signed by Ms. McKenney. *See* Exhibit 21.

[14] The Switched Access Reporting Agreement required Qwest to pay Eschelon the difference between $13.00 per line and $16.00 per line from January 1, 2001 until the parties agreed to do otherwise. *See* Letter from Audrey McKenney to Eschelon's President, p. 2 (July 3, 2001) ["Switched Access Reporting Letter"] (provided by Eschelon in response to Staff Request Number 1:2 in Docket Number RT-00000F-02-0271). Although the parties did not agree to do otherwise until March 1, 2002, Qwest also stopped paying Eschelon pursuant to the Switched Access Reporting Letter as of September 2001. Eschelon (not Qwest) had complained about other switched access reporting issues. Unlike the consulting fee, at least some other access issues were the subject of a dispute. When payments stopped, however, there was no dispute that the $3 per line (approximately $150,000 per month) was due to Eschelon pursuant to the terms of the Switched Access Reporting Letter. Qwest was not claiming, for example, that Eschelon had yet agreed otherwise.

carrier) payments, if any, continued while its participation in the CMP Core Team decreased and, if so, whether the two issues are related.

In response to Eschelon's initial statement along these lines, Qwest objects to the possible implication that "Qwest made payments to other CLECs to keep them from participating in the CMP process." *See* Qwest's June 27 Letter, p. 4. Qwest implies that Eschelon has no evidence that would suggest that Qwest would do such a thing. Enclosed with this Letter is a document, provided to Eschelon by Qwest and signed by Ms. McKenney, that provides that Qwest was willing on October 30, 2001 to pay Eschelon money as long as Eschelon refrained, among other things, "from participating in . . . Change Management Process workshops." *See* Exhibit 21 (Qwest Proposed Confidential Purchase Agreement ¶ 3). Although Eschelon did not sign this proposal, Qwest was clearly making the offer. Eschelon does not know whether any other carrier was offered and accepted this or a substantially similar proposal. The fact that Qwest made the offer to Eschelon, however, raises the legitimate question as to whether this occurred at the same or any other time.

Eschelon does not have copies of all of the approximately 100 unfiled agreements that Qwest has entered into with various carriers and, of course, it cannot have copies of unwritten agreements. In this environment, it is fair to state that Eschelon does not know whether any carrier signed a document similar to Exhibit 21 and, if so, whether Qwest continued to make payments pursuant to that agreement. Eschelon is not claiming a right to this information. It is an issue for the Commission to investigate, if it so desires.

Qwest concludes its discussion of this issue by stating that "Qwest's and Eschelon's billing disputes are wholly unrelated to the 271 process." Eschelon agrees and, quite frankly, wishes Qwest would have taken this position much earlier. If it had, Eschelon could have participated in the 271 proceedings while negotiating disputes with Qwest. Qwest's assertion now begs the question as to why Qwest then conditioned negotiation of disputes on agreements not to participate in 271 proceedings.

CMP Participation, Absence of Complaints, and Advocacy Regarding Participation in Proceedings

Except when completely excluded from meetings, Eschelon maintained some level of participation in CMP.[15] Although Qwest was not always as successful in limiting Eschelon's participation in CMP as it desired,[16] Qwest's efforts nonetheless forced Eschelon to expend resources in responding to and resisting Qwest's position. *See, e.g.*, Exhibits 8 & 13. Those resources could have been expended on other CLEC business.

[15] Although Eschelon managed to maintain some level of participation in CMP and CMP Re-design, Qwest succeeded particularly in chilling the number of live examples of problems with commercial performance that Eschelon brought to the meetings.

[16] As to whether Qwest attempted to influence Eschelon's level of participation, please see the previous section and attached exhibits.

Also, Eschelon had to consider the risks associated with upsetting its monopoly supplier while at the same time try to protect its own interests. This meant that Eschelon had to maintain a conciliatory tone and cooperate in Qwest's requests at times, even when full, uninhibited participation would have been preferable.[17]

Qwest also claims that, at any time, "Eschelon could have sought redress through ***regulatory*** or legal avenues." *See* Qwest's June 27 Letter, p. 2 (emphasis added). Qwest does not acknowledge the following restriction in the Escalation Letter:

> During the development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001,[18] Eschelon agrees not to . . . ***file complaints before any regulatory body*** concerning issues arising out of the Parties' Interconnection Agreements.

See Exhibit 14 (Escalation Letter) (emphasis added), p. 1. Despite Qwest's sweeping claims to the contrary, Eschelon could not, consistent with its obligations, file complaints before any regulatory body regarding quality of service, pricing, discrimination, or any other issue arising under the interconnection agreement during negotiations or afterward. Qwest has not explained why it insisted on the terms of the Escalation Letter as part of proceeding to develop and implement a plan to address Eschelon's quality of service complaints. It has not said why Eschelon could not both work with Qwest to develop a plan and, until satisfied, participate in the 271 and SGAT workshops.[19] When a plan was successfully implemented, Eschelon could have then filed a withdrawal from the 271 proceedings and proclaimed its issues were resolved (as SunWest apparently did, *see* discussion below). If a plan was not successfully implemented, Eschelon could have filed complaints. Although Qwest's letters suggest that Eschelon was free to do so, the provisions of the Escalation Letter were a Qwest condition of obtaining and implementing a plan to improve service quality, not a provision following successful implementation of a plan. *See* Exhibit 14; Eschelon's June 24 Letter (pp. 2-4).

Although Qwest conditioned obtaining and implementing a plan to improve service quality upon not opposing Qwest in 271 proceedings, Qwest claims that the purpose of the Escalation Letter "was not to suppress complaints but to *resolve* them." Qwest's June 18 Letter, p. 1 (emphasis in original). As discussed, the text of the Escalation Letter expressly suppresses complaints before, during, and after

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[17] Also, as indicated above, the limitations on Eschelon's participation did result in some decisions that lasted beyond the meetings in which Eschelon's participation was affected or precluded.

[18] As indicated in Eschelon's June 24 Letter, this date was extended until the end of July 2001.

[19] Qwest refers to agreements "wherein a CLEC agreed not to participate in the 271 proceeding" and states that "there were only ***two*** such agreements." Qwest's Comments, p. 3 (emphasis added). Qwest then goes on to discuss ***three*** such agreements: Eschelon, XO, and McLeodUSA (unwritten agreement "not to be involved in 271"). *See id.* pp. 4-5 & 8. Qwest has not explained why any of these agreements were necessary, if the information possessed by these three CLECs and their participation would not have affected the outcome of the 271 proceedings anyway, as claimed by Qwest.

implementation of a quality service plan. Additionally, as Eschelon previously pointed out:

> [O]n October 30, 2001, Qwest provided two written proposals to Eschelon. In those proposals, Qwest said it would require Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process" relating to missing switched access minutes to Qwest. Qwest also conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." Eschelon refused to sign these proposals. The issues between Eschelon and Qwest could easily have been resolved without these provisions, which did nothing to address problems experienced by Eschelon. But, Qwest included those terms as an integral part of its proposals.

See Eschelon's June 24 Letter, p. 5; *see also* Exhibit 21 (Proposed Confidential Billing Settlement Agreement, ¶ 7 & Proposed Confidential Purchase Agreement, ¶ 3). Ms. McKenney signed these proposals, copies of which are attached. *See id.*[20] Qwest has not explained the purpose of delivering all evidence of the audit process to Qwest, if not to "suppress" information. *See* Qwest's June 18 Letter, p. 1.[21] With respect to the proposal that said Eschelon would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)," *see id.*,[22] it provided no limitation on Qwest's requests, such as that the testimony requested be true and accurate.[23] The agreement simply contained an offer of a monetary inducement to obtain services and testimony upon request.[24] The same document required that the agreement remain confidential.

[20] Qwest has actually suggested that Ms. McKenney may represent Qwest on the committee it has said that it will form to review agreements with respect to the filing requirement. *See* Exhibit 22 (Excerpt from Minnesota transcript, p. 47, line 23 – p. 48, line 2 & p. 50, line 22 – p. 51, line 7).

[21] Although Qwest may argue that this provision relates to protecting customer-identifying information, that is not the case. Most of the audit documents contain no customer-identifying information. In any case, both Qwest and Eschelon routinely deal with customer-identifying and other confidential information without making one carrier turn everything over to the other. As indicated in Eschelon's letter to Mr. Nacchio (discussed in Qwest's Comments, p. 8), Qwest's verbal communications to Eschelon suggested Qwest's intent even more clearly than the written documentation.

[22] Qwest's Proposed Confidential Purchase Agreement (¶ 3) also provided: "Eschelon agrees, during the term of this PA, to refrain from initiating or participating in any proceeding (regulatory, judicial, arbitration, or legislative) where Qwest's interests may be implicated, including but not limited to, formal or informal proceedings related to Qwest's or its affiliates' efforts to obtain relief pursuant to section 271 . . ., including but not limited to, Change Management Process workshops, performance indicator/assurance dockets and cost dockets." *See* Exhibit 21.

[23] The fact that Eschelon need not be reminded of its obligation to testify truthfully (as alleged by Mr. Martin) is evident from the fact that Eschelon (and not Qwest) raised this issue. Without language in the document to this effect, however, the proposed contractual obligation reads as Qwest intended it – as requiring Eschelon to testify when and how dictated by Qwest.

[24] Qwest's proposal provided that payments would be made monthly so long as Qwest unilaterally determined that Eschelon was providing services "satisfactory" to Qwest. *See* Exhibit 21at ¶ 2. Those

See id. Therefore, if Eschelon agreed to the proposal, it would be placed in the position of having to offer testimony without disclosing a fact that would bear on the veracity of that testimony – it had been induced. Eschelon rejected Qwest's proposals, although it did not do so lightly. Eschelon viewed this as its Cuban Missile Crisis with Qwest and genuinely did not know how Qwest would react.

Although Qwest claims that it was just negotiating routine settlement agreements, Qwest has not explained why provisions relating to delivery of evidence to Qwest or testifying as dictated by Qwest are legitimately related to resolving genuine service and pricing disputes. In negotiations, Qwest would not discuss resolution of legitimate issues such as missing switched access minutes, however, without also discussing a commitment by Eschelon relating to evidence and testimony. In its response, Qwest does not address the language of the documents in Exhibit 21. *See* Qwest's Comments, p. 10. Similarly, when Eschelon raised this question in a letter to Qwest's then Chief Executive Officer Joseph Nacchio (which was copied to Qwest's current General Counsel),[25] Qwest did not respond to the specific facts. As Qwest indicates in its Comments, Qwest said that it would not "dignify each of Mr. Smith's allegations with a response." Qwest's Comments, p. 9.[26] After reading the documents in Exhibit 21 and considering the absence of an explanation, however, a more reasonable conclusion is that Qwest was silent with respect to the proposals in Exhibit 21 because the documents speak for themselves.[27]

Instead of addressing that issue or acknowledging the express language of the Escalation Letter suppressing complaints, Qwest argues that Eschelon "evidenced a continuing awareness of its ability to go to the regulators if its concerns were not addressed." Qwest's June 27 Letter, p. 2; Qwest's Comments, p. 7. The fact that Eschelon's participation was virtually non-existent in 271 proceedings, combined with

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"services" included, for example, Change Management functions. *See id.* If Qwest was not "satisfied" in any particular month, Qwest could, in its discretion, penalize Eschelon for behavior it deemed bad by refusing payment. *See id.*

[25] Qwest states in its Comments (p. 8) that AT&T submitted a copy of Eschelon's February 8, 2002, letter to Mr. Nacchio with its filing in both Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. Therefore, Eschelon has not attached another copy with this filing. Although the Escalation Letter required Mr. Nacchio to meet with Eschelon, he refused to do so. Although Mr. Nacchio indicated that Ashfin Mohebbi would act on his behalf (*see* letter attached to Qwest's Comments), the Escalation Letter specifically identified Mr. Naccho and not a subordinate. *See* Exhibit 14. Moreover, despite Mr. Nacchio's representation, Mr. Mohebbi never participated in escalation (or any) discussions.

[26] Qwest states that it attached a copy of Mr. Martin's letter to its Comments, so Eschelon has not attached another copy with this filing.

[27] The other point that Qwest states it will not "dignify" with a response is a point that was not even made by Eschelon. *See* Qwest June 27 Letter, p. 1, note 1. Although Qwest focuses on some introductory language from a *Wall Street Journal* article cited by Eschelon, Eschelon's June 24 Letter (p. 1) clearly cites the article as evidence to support Eschelon's statement that "Qwest continually attempted to distinguish Qwest from the former company, US West." The examples in the *Wall Street Journal* show this is the case. Qwest's silence on this latter point may reasonably be viewed as an admission that it cannot dispute the truth of the statement about Qwest's conduct vis a vis the former US West.

the absence of Eschelon complaints against Qwest (on non-cost issues),[28] shows that Eschelon was not in a position to put that advocacy to the test by risking a breach of the Escalation Letter. Eschelon did argue privately to Qwest that Eschelon believed it had the right to participate more fully in proceedings. Because Qwest routinely did not respond in writing to Eschelon's letters, Qwest has left itself the option of pointing to Eschelon's letters as though Qwest agreed with them at the time. Qwest fails to mention, however, that Qwest verbally opposed Eschelon's advocacy in this regard in no uncertain terms.

One example, in particular, stands out. Eschelon argued to Qwest that the Escalation Letter's requirement that Eschelon "not oppose" Qwest in 271 did not preclude participation in proceedings relating to the language of Qwest's Statement of Generally Available Terms ("SGAT").[29] For example, in a letter dated April 5, 2001, Eschelon argued to Qwest: "In theory, Eschelon can either shape interconnection agreements through participation in SGAT proceedings or we can attempt to negotiate agreements with Qwest as desired by Qwest. . . . Either the Implementation Plan must deal substantively with the interconnection agreement process or Eschelon must participate in SGAT proceedings." Exhibit 23, p. 4. Although Qwest is not specific, Eschelon's assertion in this letter apparently "evidenced a continuing awareness" of Eschelon's ability to participate in SGAT proceedings. On this particular occasion, Eschelon not only made its argument but also attempted to act upon it. Eschelon sent a representative, Ms. Clauson, to the multi-state SGAT workshop held in Denver April 30 – May 2, 2001.

Qwest's opposition was swift and unambiguous. Shortly after Ms. Clauson entered the room where the workshop was held, Nancy Lubamersky of Qwest picked up her cell phone and left the room. Before the first break, Qwest had called Eschelon's President to complain of Ms. Clauson's presence. In addition, at the outset of the first break, Qwest's attorney Charles Steese summoned Ms. Clauson to the hallway for a conversation. Mr. Steese told Ms. Clauson in no uncertain terms that she should not be present. He said that he had it on good authority that the agreement to keep Eschelon out of the 271 proceedings specifically included Ms. Clauson. Ms. Clauson attempted to explain the actual language of the Escalation Letter, but Mr. Steese was not interested. Through Qwest's calls to Eschelon and conversation with Ms. Clauson, Qwest succeeded in chilling Eschelon's full participation. After the workshop, Qwest called Eschelon to the carpet and made Eschelon explain "what Karen Clauson had said and had not said" during the workshops. *See* Exhibit 24. In a follow up conference call "to discuss Karen's participation in that meeting and in similar future meetings," *see id.*, Qwest re-iterated its position that Eschelon could not participate in the SGAT workshops. Eschelon did not participate in 271/SGAT workshops after this additional demonstration of Qwest's opposition.

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[28] The Escalation Letter provided that Eschelon could, after notice to Qwest, participate in regulatory cost dockets or dockets regarding the establishment of rates. *See* Exhibit 14.
[29] *See* Eschelon's June 24 Letter, p. 3 & note 8.

271 Participation: March of 2002 and After

Qwest states: "Importantly, the Agreement, including any agreement not to oppose Qwest's application for relief under Section 271, was terminated in February of 2002. To the extent that Eschelon decided not to participate fully in the 271 process after that termination, it was Eschelon's internal business decision that mandated that result, not the Agreement." Qwest's June 27 Letter, p. 2; *see also* Qwest's Comments, p. 7. The agreement to not oppose Qwest's 271 bid did not terminate until an effective date of February 28, 2002. *See* Exhibit 25. That agreement was executed on the afternoon of Friday, March 1, 2002. *See id.* Therefore, the first business day on which Eschelon could actually participate in Qwest 271 proceedings was March 4, 2002. On March 4, 2002, Eschelon provided discovery responses to the Minnesota commission, including a 3-inch, 3-ring binder of materials, in Minnesota's 271 proceeding. Minnesota had completed fewer 271 workshops or hearings at that point than other states, and it was one of the few states in which discovery had been directed to Eschelon. Shortly afterward, Eschelon provided similar materials to the Washington commission in response to discovery requests in its 271 proceeding. Recently, Eschelon filed comments with the Federal Communications Commission ("FCC") in opposition to Qwest's 271 application. *See* Exhibit 26 (also available, with exhibits, at http://www.fcc.gov/e-file/ecfs.html).

Significantly, Qwest discusses Eschelon's alleged lack of participation in 271 proceedings after termination of the agreement without mentioning that the 271 workshops were essentially completed by then and, when Eschelon has attempted to participate, Qwest has opposed those efforts. In Arizona, Eschelon understood that all workshops were completed by March 2002. Arizona held special open meetings addressing Qwest Operations Support Systems ("OSS") and Performance Assurance Plan ("PAP") after that date, but those meetings would have been particularly difficult to participate meaningfully in without the benefit of participation in the preceding proceedings on those complex topics. To the extent that any 271 proceedings in other states remained active, they were so far along that getting up-to-speed on substance and procedure in time to participate meaningfully was not a realistic possibility. Moreover, when Eschelon attempted to participate in the Minnesota 271 proceeding and to support AT&T's efforts to re-open other proceedings, Qwest opposed those efforts. In Minnesota, Qwest filed a motion to strike Eschelon's testimony. Absence from the 271 proceedings for a period of more than a year has affected Eschelon's ability to participate effectively in 271 proceedings at this point. Although Eschelon has attempted to participate in 271 proceedings on and after March 4, 2002, the reality is that Qwest succeeded in its objective that Eschelon not participate meaningfully for the time period when participation mattered.

Ironically, after criticizing Eschelon for not participating in 271 proceedings after February of 2002 (*see* Qwest's June 27 Letter, p. 2; Qwest's Comments, p. 7), Qwest will likely complain now that Eschelon has filed comments with the FCC in opposition to

Qwest's 271 bid. Qwest has questioned the motives of other CLECs that have challenged its 271 bid on the grounds that they are merely trying to keep Qwest out of their market rather than raising genuine concerns. Qwest may do so now as to Eschelon as well. Eschelon is not an interexchange carrier ("IXC") itself; Eschelon resells the long distance service of another carrier. Eschelon recognizes, however, that allowing Qwest to enter the in-region, interLATA market prematurely would be detrimental to Eschelon, as well as other CLECs and IXCs in Qwest's territory. When weighing this as a motive for Eschelon's actions, however, the Commission should consider that Eschelon nonetheless at one time entered into the Escalation Letter and said it would possibly even support Qwest's 271 bid in 271 proceedings if Qwest's performance justified doing so. That didn't work. Eschelon is opposing Qwest's 271 bid now because genuine commercial performance issues show that Qwest's entry into the in-region long distance market at this time would be premature. *See* Exhibit 26.

Any Benefit Unrelated to Limitation on 271 Participation

Qwest argues that persuading CLECs to stay out of the 271 proceedings aided the process and benefited all CLECs. *See* Qwest's Comments, pp. 7 & 10. For example, Qwest argues that developing an implementation plan to improve the provisioning process for Eschelon benefited all CLECs because the improved process was implemented uniformly. *See id.* While Eschelon agrees that efforts to improve Qwest's provisioning process benefited CLECs, as well as Qwest, Eschelon does not agree that this could not have been done without an agreement to stay out of 271 proceedings. Qwest could have simply worked with CLECs to understand their needs and the CLEC perspective and then improved its processes accordingly. Unfortunately, Qwest was not willing to proceed on that basis.[30]

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[30]Qwest entered into a confidential agreement with Eschelon, which has since been terminated as to Eschelon, providing for a 10% consulting fee. *See* Consulting Fee Agreement, at ¶ 3. Qwest could have filed this agreement with the commissions and made it available to other CLECs, but it chose not to do so. The fee was part of an arrangement under which Qwest was supposed to purchase consulting services from Eschelon that would benefit all CLECs. As indicated, Qwest recently testified that it now places a "very high value" on the consulting services of Eschelon. *See* Rixe Testimony, p. 9, line 15. Eschelon firmly believes that its efforts were valuable and, in arguing this point, provided documentation and information to Qwest to support Eschelon's position. While Eschelon believes that Qwest benefited from Eschelon's actions because Eschelon expended substantial resources trying to get Qwest to improve its performance, Qwest did not recognize this at the time or actually accept the consulting services. Qwest resisted Eschelon's efforts to form teams or otherwise work on a true consulting basis to improve Qwest's processes. The amount of resources that Eschelon expended to attempt to effectuate change were far more excessive than they needed to be if Qwest had accepted Eschelon's services willingly, given Eschelon (and other CLECs) visibility into its processes, and worked together at an early stage to ensure that processes, when developed, met CLEC needs. For Qwest to now describe in favorable terms its adversarial position that caused such additional resource expenditures does not capture the true course of events, even though Eschelon does agree that its efforts benefited Qwest and other CLECs as well. More recently, it has come to light that Qwest was entering into other unfiled agreements at the time, such as reported agreement(s) ostensibly to purchase fiber capacity, for a discount. If so, this additional information provides further evidence that Qwest's costs are not cost-based, because they allow for Qwest to offer these "discounts" in various forms, and the resale discount, in particular, may need to be reviewed.

What Could Have Been

Qwest attempts to place an unattainable burden on CLECs: to show what would have transpired if the 271-related agreements had not existed. *See, e.g.*, Qwest's June 27 Letter, p. 1. Because of such an agreement, however, Eschelon was not involved in the 271 process and does not know whether all of its issues have been addressed. Eschelon can indicate that Qwest commercial performance problems still exist. *See* Exhibit 26. Eschelon can also point out that its business plan is different from other CLECs that were involved in the process. Eschelon recognizes and appreciates the diligent, resource-intensive, and valuable efforts of larger CLECs, but their needs and those of Eschelon are not the same. In fact, none of the "committed advocates" listed by Qwest as participants in the proceeding have the same needs or information as Eschelon. *See* Qwest's Comments, p. 11. Nor do they have the commercial experience in Qwest's territory comparable to that of Eschelon and McLeodUSA, reportedly Qwest's two largest wholesale customers, neither of which participated. Undoubtedly those participants are committed, but different business plans and commercial experience are significant factors when shaping terms of an SGAT or analyzing commercial performance.

The existence or non-existence of the 271-related agreements is not the only factor affecting what could have been. In June of 2001, Qwest received discovery requests that, by its own account, sought production of the agreements not to participate in 271, but Qwest did not produce them. This fact presents the question of what would have transpired if Qwest complied with the discovery request last June.

On June 11, 2001, AT&T served the following discovery request on Qwest:

> Please produce all agreements, letters and other documents of any kind that reflect the terms and provisions, or any term or provision, of settlement made between Eschelon and Qwest.

Exhibit 27 (AT&T's Thirteenth Set of Data Requests to Qwest, Request No. 126, 271 multi-state proceeding, June 11, 2001).[31]

AT&T also requested copies of such agreements with McLeodUSA and a company called Sun West Communications, Inc. ("SunWest"). *Id.*[32] SunWest had raised issues relating to Qwest's provisioning of unbundled loops deployed over IDLC with number portability in the Colorado 271 workshop. On June 1, 2001, Qwest filed a

[31] Also available at www.libertyconsultinggroup.com/discovery_requests.htm.
[32] In addition, with respect to any carrier, AT&T requested any "settlement made by Qwest of any dispute over Qwest's compliance, or lack of compliance, with one or more items of the competitive checklist set forth in 47 USC § 271(c)(2)(B)." *Id.*

"Withdrawal of Opposition to Qwest's Petition to Obtain Approval to Enter the In-Region InterLATA Telecommunication Market" in the Colorado 271 docket on behalf of SunWest [Withdrawal]. *See* Exhibit 28. In the Withdrawal, SunWest said that it had reached a settlement with Qwest. SunWest also said that the issues it raised in the Section 271 workshops had been resolved to SunWest's satisfaction. *See id.* The timing of AT&T's discovery request (dated ten days after the Withdrawal) suggests that the mention of a "settlement" in the Withdrawal prompted AT&T's request. By June 11, 2001, Eschelon was absent from 271 workshops, even though Eschelon had previously raised significant issues in those proceedings. Unlike SunWest, Eschelon's quality of service issues had not been resolved to Eschelon's satisfaction.

With respect to SunWest, Eschelon, and McLeodUSA, AT&T requested "settlement" agreements. Qwest specifically states that the two agreements referred to by Commissioner Spitzer that mention Section 271 proceedings, which include the Eschelon Escalation Letter, are "settlements." *See* Qwest June 18 Letter, p. 1. Therefore, by Qwest's own account, the agreements are responsive to AT&T's request. Qwest responded, however, by objecting to the request without providing copies of any agreements.[33] Qwest said:

> In addition to the General Objection, Qwest objects to this request on the grounds that it is overly broad, global, seeks information protected by the attorney-client privilege, attorney work product doctrine, or any other legally cognizable privilege, seeks third-party confidential information, seeks information that is highly confidential, proprietary, and competitively sensitive, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

See Exhibit 29 (Qwest's Objections and Responses to AT&T's Thirteenth Set of Data Requests, Response to Request No. 126, 271 multi-state proceeding, June 20, 2001).[34]

Although Qwest objected that the Request called for "third-party confidential information," Qwest did not ask Eschelon for consent to disclose any agreements before responding to AT&T's request, despite language in some of the agreements indicating that they could be disclosed with express written consent of the other party. Nothing in the Escalation Letter prevented Qwest from seeking consent to provide copies in discovery. In addition, with respect to the Consulting Fee Agreement (¶ 10), it provides:

> In the event either Party . . . has a legal obligation which requires disclosure of the terms and conditions of this Confidential Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at is option, to take

[33] On every occasion on which Eschelon has been asked to produce its unfiled agreements with Qwest in discovery, Eschelon has provided copies of them (including the Escalation Letter).
[34] Also available at www.libertyconsultinggroup.com/discovery_requests.htm.

such action as may be legally permissible so as to protect the confidentiality provided in this Agreement.

Although Eschelon received a copy of the above discovery request directed to Qwest, Eschelon did not exercise its option to take any action to protect the confidentiality provided in the Agreement. Yet, Qwest did not produce the Consulting Fee Agreement or any of the other agreements, including the Escalation Letter, to AT&T in its Response. As indicated, AT&T served its discovery request upon Qwest on ***June 11, 2001***. If Qwest had provided AT&T with copies of the Eschelon, McLeodUSA and other agreements at that time, AT&T (and any other party receiving copies of discovery responses) could have raised the issues being addressed by the Commission now at least ***seven months*** earlier.[35] The Commission will decide whether, in addition to identifying any "specific terms or issues" that were not addressed in the 271 workshop process,[36] these facts are relevant.

Conclusion

In Eschelon's June 24 Letter, Eschelon indicated that it hesitated to send its letter for a number of reasons, including the state of the telecommunications market, tight resources particularly for a start-up, smaller company, and the fact that Eschelon has settled some of its own claims with Qwest and may be viewed as late in speaking out. Twenty-some additional pages and many exhibits later, Eschelon can confirm that going down this path has caused resource expenditures. Given the statements in Qwest's June 27 Letter and Qwest's Comments and the Commission's expression of its desire for more information to assess those statements, however, it seems incumbent upon Eschelon to provide this information. At the same time, Eschelon is aware that some may criticize Eschelon for entering into unfiled agreements with Qwest. Eschelon had pressing service and pricing issues that it needed resolved to stay alive.[37]

With respect to Qwest's application for 271 approval, Eschelon has stated its position in its FCC filing. *See* Exhibit 26. Although Eschelon was not an active participant in the Arizona 271 proceeding so it cannot state how each of these issues was addressed, Eschelon can state that the unresolved commercial performance problems described in those Comments occur in Arizona as well. With respect to issue of the impact of the unfiled 271-related agreements on the proceeding, Eschelon has laid out facts responsive to points raised by Qwest that the Commission may use in making its

[35] A&T has indicated that it did not learn of the agreements until after the Minnesota Department of Commerce filed it complaint relating to unfiled agreements in February of 2002. Although AT&T's discovery request was served in the multi-state 271 proceeding, information from one proceeding often also becomes available in other proceedings. Once AT&T received the information in the multi-state proceeding, AT&T could have also requested it in Arizona, for example.

[36] Eschelon believes that it has identified such terms and issues, because it has identified commercial performance problems that remain unresolved. *See* Exhibit 26.

[37] When considering relative positions of the parties, Eschelon is a $100 million CLEC with 900 employees, and Qwest is a $19 billion RBOC with 60,000 employees.

determination. Commissioner Spitzer's Letter of June 26 suggested that Eschelon and Qwest address the inconsistencies between their earlier letters, and Eschelon has tried to be responsive to that request.

Sincerely,

J Oxley

J. Jeffery Oxley
Vice President, General Counsel, and Corporate Secretary

cc: Chairman William A. Mundell (by facsimile & overnight mail)
Todd L. Lundy, Qwest (by U.S. mail)
Richard Corbetta, Qwest (by email)
Paul A. Bullis, AG Public Advocacy Division (by U.S. mail)
Lindy P. Funkhouser, Residential Utility Consumer Office (by email & U.S. mail)
Docket Control (original plus 20 copies) (by overnight mail)
Service Lists (all parties of record in both dockets) (by email & U.S. mail)

F

EXHIBIT F

CONFIDENTIAL

G

EXHIBIT G

CONFIDENTIAL

H

EXHIBIT H

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